

Parts Depot, Inc. and Jose Castro. Case 12–CA–18478

September 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On June 22, 1998, Administrative Law Judge Richard J. Linton issued the attached decision, as corrected on July 17, 1998, and May 12, 2000. The Respondent and the General Counsel each filed exceptions and a supporting brief and an answering brief to the other party's exceptions, and the Respondent filed a reply to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order² as modified.

The General Counsel excepts to the judge's dismissal of complaint paragraph 6(c) which alleges that "[o]n or about October 24, 1996," the Respondent's warehouse manager, Leo Belaunzaran, "impliedly threatened employees with discharge in order to discourage [them] from engaging in union activities and/or to discourage

[them] from giving testimony in a Board proceeding."³ In support of this allegation, the General Counsel presented Charging Party Jose Castro, who testified that Belaunzaran told Castro that he (Belaunzaran) "was tired of so many problems with Castro," and that he (Belaunzaran) had been told that Castro was "making a book" of everything going on in the Company. Castro admitted to recording events in a notebook, but only to document the "psychological pressure and emotional stress" and "mental games" imposed on him by Belaunzaran and Fleet Supervisor Williamson. Belaunzaran replied that "within one week this is going to end," that he (Belaunzaran) was going "to resolve it." Belaunzaran denied threatening Castro but acknowledged that he may have told Castro that he "was getting tired" of incidents involving Castro and that "[e]nough is enough."

Although the judge found that the conversation had in fact occurred and credited Castro's version, he nevertheless dismissed the allegation because the General Counsel failed to establish that the incident occurred on October 24, 1996, as stated in the complaint.⁴ We reverse.

"It is well-settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995), quoting *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf'd. 920 F.2d 130 (2d Cir. 1990).⁵ The Respondent had sufficient notice of the acts on which the General Counsel based its charge and was afforded an opportunity to, and did, prepare and present its defense to the charge. The matter was fully litigated when the Respondent presented testimony from Belaunzaran as to his *version* of the conversation, but did not dispute *that* the conversation occurred. The judge specifically credited Castro's version and found that Belaunzaran did in fact impliedly threaten Castro with discharge. We therefore find that,

¹ The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated a bias against the Respondent in his analysis or discussion of the evidence.

In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) when it discharged Jose Castro on November 5, 1996, we find that the General Counsel met its burden under *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of demonstrating that union animus was a motivating factor in the Respondent's decision but that the Respondent met its burden of proving that it would have discharged Castro for insubordination under its progressive discipline policy even absent his union activity.

² We agree with the judge's observation that the violations found in this case provide further basis for issuing a bargaining order, as recommended by him in a prior proceeding involving this Respondent, and which recommendation we have affirmed in our decision issued this date. See *Parts Depot, Inc.*, 332 NLRB No. 64 (2000). Accordingly, we find it unnecessary to issue duplicative bargaining orders in these two proceedings, particularly where the bargaining order in the other decision is expressly based in part on the violations found in this case. Accordingly, we will delete the bargaining order in this proceeding as it is redundant.

³ Castro and others were subpoenaed to testify on August 26, 1996, in Case 12–CA–16449. The hearing in that case commenced on April 22 and ended October 8, 1996. Castro presented his subpoena to Belaunzaran on August 23, 1996. The judge found, and we agree, that Belaunzaran's statement to Castro, that "You cannot go there [attend the hearing]. [The subpoena is] not signed by a master. Just wait for the consequences" constituted unlawful interference with the vindication of employee rights under the Act, in violation of Sec. 8(a)(1) and (4).

⁴ The judge noted that Castro alternatively testified that the conversation occurred approximately 1 or 2 weeks before his November 6, 1996 discharge, and that it occurred on August 28, 1996, as recorded in his notebook.

⁵ In *Pergament* the court stated "[i]n the context of the Act, due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice and when the conduct implicated in the alleged violation has been fully and fairly litigated." *Pergament*, supra at 134.

notwithstanding the ambiguity of the date, the matter has been fully litigated. We accordingly find that the Respondent violated the Act as substantively alleged in complaint paragraph 6(c).⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Parts Depot, Inc., Miami and Ft. Lauderdale, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1(b).

“(b) Impliedly threatening employees with discharge because they testify against Parts Depot in a Board proceeding or to discourage employees from testifying or otherwise engaging in union activities.”

2. Delete paragraph 2(a) and renumber the following paragraphs accordingly.

3. Substitute the attached notice for that of the administrative law judge

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT impose onerous working conditions on you because you engage in union or other protected concerted activities, or because you testify in an NLRB proceeding, or otherwise discriminate against any of you for supporting Union of Needletrades, Industrial and Textile Employees, AFL-CIO (UNITE) or any other union.

WE WILL NOT interfere with the vindication of your rights under the National Labor Relations Act by telling

you not to honor subpoenas issued by the National Labor Relations Board.

WE WILL NOT impliedly threaten you with discharge because you testify against Parts Depot in a proceeding before the National Labor Relations Board or in order to discourage you from testifying or otherwise engaging in union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

PARTS DEPOT, INC.

George Aude, Esq., for the General Counsel.

Kenneth A. Knox, Esq. and *Amanda C. Salter, Esq.* (*Fisher & Phillips*), of Ft. Lauderdale, Florida, and Atlanta, Georgia, for the Respondent, PDI.

Brent Garren, Esq. (*UNITE*), of New York, New York, for the Intervenor, UNITE.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. “By the streams of Babylon we sat and wept,” the Psalmist recalls in anguish. (Ps. 137:1.) There, over 200 years before Alexander swept away the Persian Empire, only to die at Nebuchadnezzar’s palace,¹ and some 2000 years after the Great Pyramid of Cheops rose from the plateau called Giza,² King Belshazzar of Babylon gave a great banquet for a thousand of his nobles. At the height of the drinking and entertainment, fingers of a man’s hand appeared and, on the plaster of the palace wall, wrote these four words:

ME ME, ME ME, THEE THEE

When Babylon’s sages were unable to decipher the inscription for the terrified king, Daniel was summoned and explained the mysterious message to him. (Dn. 5:1–30.)

Unlike the cryptic *ME ME, ME ME, THEE THEE* and *THEE THEE* handwriting on the palace wall of ancient Babylon, the September 9, 1996 brutal and hostile words of PDI consultant Peter Bassett to Jose Castro [less than 2 weeks after Castro testified against PDI and Bassett, a former division president of Parts Depot, Inc.] constituted, in the words of the Government, a “declaration of war” against Castro. The handwriting was on the wall for Castro, and no Daniel was needed to interpret it. Indeed, less than 2 months later PDI fired Castro.

This discharge case (Jose Castro, the Charging Party, was fired November 6, 1996) is a sequel to a *Gissel*³ case (Government sought an order requiring the employer, Parts Depot (PDI), to recognize and bargain with UNITE (the Union) based on a majority card-showing plus severe unfair labor practices)

¹ M. Wood, *In The Footsteps Of Alexander The Great* 94 (1997, Univ. of Calif. Press).

² P. Thompkins, *Secrets Of The Great Pyramid* 1, 219 (1971, Harper & Row).

³ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 71 LRRM 2481 (1969).

⁶ See *Siracusa Moving & Storage Service*, 291 NLRB 143 (1988) (discrepancy in dates, without more, insufficient to find that a respondent has been prejudiced); see also *Vermont Marble*, 301 NLRB 103, 104 fn. 8 (1991).

where, in my June 30, 1997 decision (GCX 1(I)),⁴ I issued a recommended Order that PDI recognize and bargain with the Union.⁵ *Parts Depot 1* (now pending before the Board on exceptions to my decision).

I presided at this 5-day trial in Miami, Florida, beginning January 22, 1998, and closing April 3, 1998. Trial was pursuant to the April 28, 1997 Complaint and Notice Of Hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 12 of the Board. The complaint is based on a charge, later amended, filed by Jose Castro on November 12, 1996 against Parts Depot, Inc. (PDI, Company, or Respondent).

In the Government's complaint, the General Counsel alleges that PDI (1) violated Section 8(a)(1) of the Act on various occasions from late August 1996 to about October 24, 1996 by implied threats and other acts of interference with the statutory rights of employees, and (2) violated Section 8(a)(3) and (4) of the Act by subjecting Charging Party Castro to several specified types of harsher treatment from about early September 1996 through November 6, 1996, and, finally, by discharging Castro on November 6, 1996, all because he supported the Union and, or, testified (on August 26–27, 1996) under the Act. By its answer, PDI admits certain facts (such as discharging Castro), but denies violating the statute.

Charging Party Castro testified before me in the first case, as did the three management persons who are named in this case. As did Castro, two of the three managers testified in this second case, but one (Peter Bassett) did not. Although I find some of the violations alleged here, I dismiss the complaint as to Jose Castro's discharge on the basis of insufficient evidence of unlawful motivation. Thus, even before he testified against PDI in August 1996, Castro had twice been disciplined for insubordination to his supervisor. On his third occasion—November 5, 1996—PDI fired him the next day. Timing alone does not establish a *prima facie* case of a violation. In any event, the timing here is directly related to the insubordination. As no pretext or disparity of treatment evidence establishes a connection between PDI's declaration of war against Castro and Castro's discharge, that declaration of war animus, along with other incidents of animus, will not carry the day for Castro and the Government.

The pleadings establish that the Board has both statutory and discretionary jurisdiction over PDI, and that Parts Depot, Inc., at all relevant times, has been an employer engaged in commerce within the meaning of the statute, and that UNITE is a statutory labor organization. At trial I granted (3:386; 5:986) UNITE's January 20, 1998 written motion to intervene (GCX 17).

My decision is based on the entire record, including my observation of the demeanor of the witnesses. I have considered the posttrial briefs filed by the General Counsel, the Union

(whose brief is limited to the issue of a proper remedial order), and Respondent PDI. PDI also filed a June 4, 1998 Motion For Leave To File A Reply Brief, with its 9-page reply brief attached. As consideration of the reply brief will not delay this decision, I grant the motion and have considered PDI's reply brief. *Fruehauf Corp.*, 274 NLRB 403, JD fn. 2 (1985). I now make these

FINDINGS OF FACT

A. Background

1. Business operations and witnesses

Some paragraphs, and excerpts from my decision in the underlying case, *Parts Depot 1*, give relevant background. They read (with two exceptions, citations to the record are deleted) (JD at 9 lines 1–36):

A Florida corporation, with its corporate office at Roanoke, Virginia, PDI sells automotive replacement parts (the “after-market”) at wholesale from 11 warehouses, or distribution centers, located from Maine to Florida. Of the 11 warehouses, 4 are “full service” operations—“host” or primary warehouses that ship. The remaining seven are smaller satellite, or branch, warehouses where customers pick up (“pick-up” facilities) their orders. The four host warehouses are located at Westbrook, Maine; Roanoke, Virginia; Tampa, Florida, and Miami, Florida. Only two of the facilities are involved here—Miami (a primary warehouse) and Ft. Lauderdale (a branch). As I discuss in more detail later, in July 1994 the two facilities employed slightly over 100 employees.

PDI's November 1991 *Employee Handbook* reports that PDI has been in business since the early 1950s and that, in 1986, Rollance E. (Rollie) Olson purchased the company. Olson's title at PDI is Chairman.

Peter Bassett has a major part in this case. During May–September 1994 Bassett was president of PDI's Florida Division and was a corporate vice president. For some time, unspecified in the record, Chairman Olson had also been serving as PDI's president and was the person to whom Bassett reported. Bassett transferred to the corporate headquarters at Roanoke, Virginia about September 1994. Under Bassett, the Florida Division consisted of a primary (host or full service) warehouse in Miami and one in Tampa, with branch warehouses in Ft. Lauderdale, Ft. Myers, and Orlando. Between his designation on the first day of trial (April 22, 1996) as PDI's designated assistant exempt from sequestration, and his brief testimony as my witness on August 26 (11:1815), Bassett had left his employment with PDI. (11:1816.)

About June 1, 1994, give or take a week or so, PDI hired Al Woods as its new president. . . .

Although Bassett no longer was an employee of PDI when he testified as my witness on August 26, 1996, “At all material times,” complaint paragraph 5 alleges here, he “has held the position of Respondent's consultant and has been an agent of Respondent within the meaning of Section 2(13) of the Act.” PDI's answer, as modified at trial (1:10), admits that allegation for the limited purpose of this proceeding.

⁴ References to the five-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for those of Respondent PDI. The references are intended only as an aid, not as an exhaustive listing.

⁵ For convenience, references to the decision-exhibit (GCX 1(I)) will be as “JD” followed by cites to page and line of the JD.

If Bassett's role in this case is less prominent than that which he had in the first case, the roles of Leonel Belaunzaran and Robert Williamson (both testified before me in the first case) are greater here than there. Admitted supervisors, at all material times Belaunzaran was, and is, Warehouse Manager, and Williamson was, and is, Fleet Supervisor. Williamson reports to Belaunzaran who reports to the current (as of the trial) top management person at Miami, South Florida General Manager Phil Freidli. (1:19; 5:931-932.) The complaint does not list Freidli as a statutory supervisor, although he clearly is such. Freidli did not testify in either case, but he is mentioned in Bassett's brief testimony as my witness in the first case.

Jose Castro had a significant role in the earlier case, testifying against Peter Bassett regarding a conversation held on May 9, 1994, and against Office Manager Luisa Pacheco regarding her June 20, 1994 threat to Castro of unspecified reprisals for supporting the Union. I found violations as to both. (JD at 16, 52.)

2. The Union's organizing drive

As reported in my decision in the first case (JD at 10:25), UNITE (one of its formative predecessors, actually) began an organizing drive on May 9, 1994. The election petition was filed May 13, 1994 in Case 12-RC-7736. At the July 8, 1994 election, the vote count was 46 No, 40 Yes, and 13 challenged. Objections were filed. In my earlier decision, I found merit to certain objections, and further found that certain challenged ballots, which ordinarily should be opened and counted, should not be opened and counted because they would not change the result of the election.

3. Government's motion to remand

After my June 30, 1997 decision in the first case, the General Counsel filed a motion (GCX 1(m)), dated July 10, 1997, asking the Board to remand the first case to me and to consolidate this case with it. In denying the General Counsel's motion, the Board, by its Order of August 8, 1997, further ruled (GCX 1(n)):

However, the Board directs that the latter case [this one, 12-CA-18478] be heard and resolved by Judge Linton as soon as possible. Further, if Judge Linton finds a violation in that case, he should address the issue of whether a *Gissel* order is appropriate in light of both cases, assuming arguing that such an order is not appropriate in the former cases standing alone.

4. Order declining to recuse

As a reading of my decision in *Parts Depot 1* discloses, at places I used some strong language in referring to PDI and its motive, as found, respecting various conduct at issue there. Therefore, when the Board issued its August 8, 1997 order denying the motion to remand, but directing that I preside over the trailing case (this one), I convened an all-party conference call on September 17, 1997 to discuss the issue of whether I should recuse myself.

The practical considerations for assigning the same judge who presided at the first case, expressed in my eventual Order (GCX 1u at 3-4), are these:

The usual reasons for the same administrative law judge (ALJ) to be assigned in an unfair labor practice trial [that is, in a second or related case] are the conservation of time (to the extent familiarity with the previous record is required, a different ALJ would have to duplicate efforts and notes already made by the first judge) and the taxpayers' money ("time is money"). Were these considerations not involved, it always would be better "public relations" to send a different judge. What party would not be upset to see the same judge coming back on a new case where that judge, using some strong language, had just ruled against him in an earlier case?

From the judge's perspective, language from the concurring opinion in *Liteky* is instructive:

The acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office. As a matter of sound administration, moreover, it may be necessary and prudent to permit judges to preside over successive causes involving the same parties or issues.

510 U.S. 540, 114 S.Ct. 1147, 1161 (1994).

Following the September 17, 1997 conference call, the parties (other than the Charging Party) submitted briefs. The General Counsel (GCX 1q) and the Union (GCX 1s) opposed recusal. Indeed, as the Union argued in closing:

In the conference call, the possibility arose that Your Honor might be subconsciously inclined to find merit in the charges in the instant case to bolster the *Gissel* bargaining order. Yet, the Decision dismissed many allegations, which, had they been found meritorious, as they should have been, would have bolstered the support for the bargaining order. If there is any subconscious bias at play, it was Your Honor's bending over backwards to avoid finding merit in allegations which were substantiated in the record. In any event, speculation on unconscious bias provides no basis for disqualification.

By its five-page letter-brief of October 8, 1997 (GCX 1r), PDI argued that "recusal is warranted and proper in the present case." PDI cited several examples of statements which, it contended, "reveal a high degree of antagonism toward PDI and PDI's witnesses which, consequently, make fair judgment impossible in the present matter." As PDI continues (GCX 1r at 3):

In addition, the overall language in the June 30 Decision sets an antagonistic tone for the entire decision and certainly casts a serious question from a reasonable person's perspective as to whether the employer would be able to obtain a fair trial in a second case.

In my 12-page October 23, 1997 order declining to recuse (GCX 1u), I list several of the findings and remarks in question, and I cite *Liteky* where the Supreme Court, at 1155, wrote:

It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Nevertheless, some of my findings include, in the words of the Supreme Court in *Liteky*, 114 S.Ct. at 1157, "surrounding comments" and "accompanying opinion." Unlike the findings

themselves, which are practically immune, under *Liteky*, from a recusal attack, “surrounding comments” and “accompanying opinion” enjoy no such immunity. The tests set forth by the Court’s majority read (114 S.Ct at 1157) (bold emphasis added):

First, judicial rulings alone almost never constitute [a] valid basis for a bias or partiality motion. [Citation omitted.] In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible*. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so *if they reveal such a high degree of favoritism or antagonism as to make fair judgment impos-*

sible. As an example of the last (“will do so”) category, the Court cites the case (World War I espionage case against German-American defendants) where the judge remarked about one needing a very judicial mind, indeed, not to be prejudiced against the German Americans because their “hearts are reeking with disloyalty.” *Id.*

Applying the legal standard of *Liteky*, I declined to recuse. I wrote as follows (GCX 1u at 11–12):

My “surrounding comments” and “accompanying opinion” in *Parts Depot 1* are expressions based on the findings I made on allegations to which I found merit. Anticipating the point made by the General Counsel and the Union about the many findings I made discrediting witnesses of the Government and dismissing much of the complaint, PDI merely argues (br. at 2) that such “is not sufficient to discount the antagonistic language used against PDI.” That, I submit, begs the question. If my mind is closed against PDI, why did I credit Peter Bassett and dismiss about half the case against PDI in *Parts Depot 1*?

Even assuming that my articulating or descriptive phrases are “antagonistic,” as PDI argues, in my opinion my “surrounding comments” and accompanying opinion” do not cross the high threshold, set by the Supreme Court in *Liteky*, 114 S.Ct. at 1147, of revealing “such a high degree of favoritism or antagonism as to make fair judgment impossible.” Or, as determined by the Board about the ALJ in *Dayton Power*, 267 NLRB [202] at 203 [1983], they do not demonstrate, in light of the entire decision, that I will approach the Jose Castro case with a “closed mind” and a “predetermined” view that PDI is (to use a common phrase) “guilty as charged.”

And even if the Board’s pre-*Liteky* standard (“avoiding even the appearance of a partisan tribunal”) were applicable, the result is the same here. That is so because all my “surrounding comments” and “accompanying opinion” in *Parts Depot 1* are directly related to the findings I made as to motivation and the allegations of unfair labor practices. Such surrounding comments are in the nature of articulating and describing the basis of a particular finding. To the extent that a bit of literary license was taken at the end with the reference about “corporate lions” on the industrial Serengeti devouring Fortin (JD at 107), that, too, is based on the finding of discrimination. It does not reflect a personal opinion about a new case, and does not indicate, as in *Dayton Power*, *id.*, a “predetermined position” or a “closed mind” toward any new allegations.

Accordingly, believing that I have a duty to proceed, I decline to exercise the option of recusing myself from presiding over the Jose Castro case (Case 12–CA–18478).

As I recommended at the close of my October 23, 1997 Order, PDI filed a special appeal. By its Order dated January 26, 1998 (GCX 1bb and 19), the Board, Member Hurtgen dissenting, ruled as follows (3:386–387):

The Respondent’s request for special permission to appeal the Administrative Law Judge’s order declining to recuse is granted and the judge’s ruling is affirmed. See *Liteky v. U.S.*, 114 S.Ct. 1147 (1994).

Member Hurtgen, dissenting, would grant the appeal and reverse the judge. In his view, the judge used injudicious and inappropriate language to describe Respondent and its conduct. That language simply has no place in a judge’s opinion. Further, that language would cause reasonable persons to be concerned about whether the judge can now evaluate, dispassionately and fairly, allegations that Respondent has engaged in similar conduct. In order to allay that concern, he would assign this case to a different judge.

B. Alleged Violations of Section 8(a)(1) of the Act

1. Introduction

Four (complaint pars. 6a, b, c, and 7) of the five alleged 8(a)(1) incidents during the time frame of the first trial involve managers Belaunzaran and Williamson, and pertain to subpoenas. The fifth incident pertains to an alleged (complaint par. 8) threat of discharge by consultant Peter Bassett. By its answer, PDI denies all.

2. Jose Castro’s subpoena

a. Facts

Complaint paragraph 6(a) alleges that Warehouse Manager Belaunzaran, about late August 1996, “impliedly threatened employees with unspecified reprisals if they honored Board subpoenas and testified on behalf of the Union in an unfair labor practice proceeding involving Respondent.” PDI denies. Jose Castro testified in support.

A substantial amount of evidence was adduced concerning this allegation. Much of it was background (one exhibit, GCX 15, is a copy of certain pages of the August 26, 1996 testimony

of Castro and of Peter Bassett), plus testimony about Castro's effort to attend trial his second day, on August 27. Recall my earlier statement about my having called Bassett in the first case as my witness. My calling Bassett had to do with Castro's expressed concern about his job security if he were required to return a second day to testify rather than working. (GCX 15 at 1814.) Bassett disclosed that he no longer had any managerial authority at PDI. (GCX 15 at 1816.) Thereafter, PDI's counsel suggested that Castro should see whichever management person he informed in the first instance and that counsel would notify local management that Castro might call. (GCX 15 at 1818.) As I see it, only a small portion of this bears on the single allegation of complaint paragraph 6(a). I turn now to summarize that testimony.

Castro testified that he took his first subpoena (he received two, one for each day) and presented it to Belaunzaran "some days" (1:146) or "one or two days" (1:148) before his Monday, August 26, 1996 testimony. [As Castro's first day of testimony was on a Monday, I find, from his date estimates, that his notice to Belaunzaran occurred on Friday, August 23, 1996.] The notice to Belaunzaran (the presentation of the subpoena to Belaunzaran), took place at 9 a.m. in Belaunzaran's office. (1:146; 3:392.) Castro had received the subpoena about a day earlier. (3:394.) At the August 23 presentation, Castro testified, Belaunzaran interrogated him about who gave him the subpoena and whether it was given to him on the company's premises or delivered by mail. Castro replied that it had been delivered in person at his home. Belaunzaran said that Castro could not honor the subpoena ("you cannot go there") because the subpoena was "not signed by a master. Just wait for the consequences." (1:147-148; 3:393.)

Castro asked, "Are you refusing to allow me to go there? Are you threatening me?" "No, no," said Belaunzaran who then rose, saying he would go to (General Manager) Phil Freidli for the permission. Shortly (apparently), Belaunzaran returned and said that Castro had permission to go. (1:147.)

[I am reminded of a passage from my decision in the first case concerning the subpoena Vivian Fortin received. Thus (JD at 71, lines 11-14): "Although Fortin was not required to obtain permission to honor her subpoena, she exercised courtesy and prudence in notifying her employer the day before she was to attend. See *Yenkin-Majestic Paint Corp.*, 321 NLRB 387 and 387 fn. 3 (1996)."]

Belaunzaran's version is completely different. According to Belaunzaran, he called Castro into his office the "afternoon before" (4:796) Castro was to testify because Belaunzaran had been informed by PDI's attorneys that Castro was to testify the following day. [As no evidence indicates that Castro and Belaunzaran worked that Sunday, I find that Belaunzaran refers to Friday, August 23, 1996.] Belaunzaran called in Castro to confirm the information so that he could plan the scheduling of his drivers, and to find a substitute if Castro was to be out. The time was late afternoon. When Castro entered, Belaunzaran asked whether Castro had "an appointment the next day." Castro said no. That ended the conversation.

Accepting this at "face value," and notwithstanding the notice from PDI's attorneys, Belaunzaran did not prearrange for a substitute driver. Belaunzaran did not directly ask about a sub-

poena because that would have been asking about a "sensitive" matter. When Castro did not show for work "the next day" [Monday, August 26], Belaunzaran concluded that Castro had gone to testify, a fact the attorneys confirmed later that day. Belaunzaran did not discipline Castro for lying because PDI's attorneys advised against it. Belaunzaran denies that Castro showed him a subpoena, denies saying "just wait for the consequences," or any threat, and denies rising and going to Freidli's office to obtain permission for Castro to attend the trial. (1:41-43, 53-54; 4:796-800.)

b. Discussion

Jose Castro was more positive and persuasive than Leo Belaunzaran. Castro's version of the event is plausible, internally consistent, consistent with events at trial, and Castro testified with a more favorable demeanor (notwithstanding an irritating, and self-defeating, tendency, at times, not to answer a question directly until prodded).

Having credited Castro's version of events (as I would do if I summarized the second day, as well), I find no merit to the allegation. By his statement, "Just wait for the consequences," Warehouse Manager Belaunzaran, I find, meant that, as the subpoena was "not signed by a master," it appeared to be invalid and Castro could ignore it and just wait and see what developed. While that statement may well be illegal, particularly if stated as an order, it is not alleged. What is alleged is an implied threat of unspecified reprisals. Belaunzaran's "Just wait for the consequences" was not a statement by Belaunzaran of some future action by management against Castro for testifying, but a reference to possible action by the Government when Castro failed to honor the subpoena. This is reflected in the next exchange of words. Thus, when Castro asked whether Belaunzaran was saying Castro could not go, and whether Belaunzaran was threatening him, Belaunzaran replied, "No, no," and said he would go get the permission, which he did.

Finding that Belaunzaran made no implied threat in late August about honoring a subpoena, as alleged, I shall dismiss complaint paragraph 6(a). However, I consider Belaunzaran's statement ("You cannot go there. That's not signed by a master. Just wait for the consequences.") in the next section.

3. Telling employees not to honor Board subpoenas

a. Warehouse Manager Leo Belaunzaran

(1) Facts

(a) Introduction

Complaint paragraph 6(b) alleges that, on various dates from late August 1996 to early September 1996, PDI, by Warehouse Manager Belaunzaran, "interfered with the vindication of employee rights under the Act by telling employees not to honor Board subpoenas." PDI denies. To establish this alleged violation, the General Counsel relies on testimony given by Belaunzaran as a FRE 611(c) witness. Before reaching that, however, and as noted just above, I consider Belaunzaran's August 23, 1996 statement to Jose Castro under this allegation. The matter was litigated. It is immaterial that the litigated facts fit one allegation but not another. The due process question is whether the litigated facts fall within the scope of an existing allegation.

They do, and I now address the facts under complaint paragraph 6(b).

(b) *Jose Castro*

The facts are described above. Does Belaunzaran's August 23, 1996 statement to Castro ("You cannot go there. That's not signed by a master. Just wait for the consequences.") constitute unlawful interference? I note that neither 29 USC 161(1) nor 29 CFR 102.31(a) contains any reference to issuance by a "master." In any event, Belaunzaran's statement to Castro was much stronger than the mere expression of invalidity not found unlawful in *Laidlaw Waste Systems*, 305 NLRB 30, 35, 36 (1991). Accordingly, agreeing with the General Counsel, I find that, as alleged, Belaunzaran's August 23, 1996 statement to Jose Castro violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 6(b). *Tufo Wholesale Dairy*, 320 NLRB 896 at 896, 904-905 (1996); *Bobs Motors*, 241 NLRB 1236 (1979).

(c) *Others*

Belaunzaran testified that, in addition to the Jose Castro subpoena matter, three other employees—Regla Martinez, Edwin Pinzon, and Irma Davidson notified him that they had received Board subpoenas and asked him whether they had to go. He told each that it was a personal decision each would have to make. He did not tell them they had to go, or that PDI would give them time off to attend, nor did he tell them not to testify, that PDI did not want them to testify, or that their jobs would be jeopardized if they testified. As to Davidson, who asked whether she would get into trouble if she did not comply, Belaunzaran replied that, in his personal opinion, she would not get into trouble, but that it was a personal decision she had to make. Asked what his opinion was based on, Belaunzaran answered, "Based on my feelings." When then asked what he thought would be required before he would think someone would get into trouble for not honoring a subpoena, Belaunzaran replied, "Honestly, I couldn't say, your Honor." He then repeated that what he had told Davidson was his opinion that she would have to make the decision as a matter personal to her. (1:45.) [Belaunzaran's demeanor gave the impression of someone evading the obligation to answer honestly by responding with an "I don't know" (a not infrequent response of Belaunzaran) so as to avoid testifying that he had been told that before someone can get into "trouble" for not honoring a Board subpoena there must be court enforcement and that actions to obtain such are not always filed.]

Belaunzaran prepared file memos documenting his conversations with the three employees, and the memos are in evidence. (1:38-53, 68.) His August 26, 1996 file memo for Regla Martinez reads (GCX 7):

On this day Regla came to see me in my office and showed me a subpoena from the N.L.R.B. and she said that she did not want to go. I explained that it was her decision whether to go or not. At this time she put it in my garbage can.

His August 28 memo to Edwin Pinzon's file reads (GCX 5):

On this day Edwin came to my office with a subpoena from the N.L.R.B. and asked me if he had to go. I explained to him

that it was a personal decision that he had to make. He said that he was not going to go and left my office.

Finally, the September 3, 1996 memo to Irma Davidson's file reads (GCX 6):

This morning Irma came to my office to show me a subpoena from the N.L.R.B. and asked me that if she did not go if that will create a problem for her. I told her that it was a personal decision she had to make and that it was my personal opinion that she was not going to get in trouble, but again that was a decision she had to make on her own.

None of the three testified in the first trial.

(2) Discussion

Belaunzaran's statement to each of the three (whether to comply with their subpoenas was their personal decision) could be interpreted by some employees as impliedly telling them that they have a choice and may choose to decline if they so desire. But it also is subject to a different interpretation—"That is your business. It is a legal matter and I can't get involved. I have no further comment."

In the absence of other evidence showing something more in the way of interference, finding a violation as to this limited statement would place an affirmative burden on an employer to advise an inquiring employee that he or she is obligated to comply. Violation of an affirmative duty would have to be alleged as "failed to advise . . ." No such allegation exists here. As Belaunzaran's limited statement to the three did not, as alleged, interfere with the vindication of statutory rights by telling employees "not to honor Board subpoenas," I shall dismiss complaint paragraph 6(b) as to this limited statement by Belaunzaran.

Belaunzaran's statement to Irma Davidson included the additional matter that in his personal opinion she would not get into trouble. This addition, I find, pollutes the atmosphere with the strong suggestion that a Board subpoena carries no authority. This distorts the fact that a Board subpoena carries the force of law. Belaunzaran's statement to Irma Davidson violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 6(b). *Tufo Wholesale Dairy*, 320 NLRB 896 at 896, 904-905 (1996); *Bobs Motors*, 241 NLRB 1236 (1979).

b. *Fleet Supervisor Robert Williamson*

(1) Facts

Complaint paragraph 7 alleges that, about late August 1996, Fleet Supervisor Williamson interfered with the vindication of employee rights under the Act "by telling employees not to honor Board subpoenas." PDI denies. Jose Castro testified in support.

At the 10:10 or 10:15 morning break, following Castro's 9 a.m. presentation of his subpoena to Belaunzaran on August 23, 1996, Castro testified (in English), Fleet Supervisor Williamson called Castro into his office. Just the two were present. Williamson asked Castro what had happened to "your letter." Castro asked, "What letter?" The "subpoena," Williamson replied. Then Williamson added, "You forget it. You don't need to go to the court. No problem. I speak to Leo [Belaunzaran] for you. And you and Leo [have] no problem if you don't go to the

court.” Castro responded with a “That’s it” [apparently as a question meaning, “If that is all, may I leave?”], which Williamson answered with, “Go ahead.” At some point in the conversation, Castro testified, Williamson said that “The Union is no good.” (1:148–151; 3:392–393.) On cross examination Castro changed the location of the conversation to the patio, and Castro concedes that he made no entry in his notebook (GCX 20) about the incident, explaining that he simply forgot to do so. (3:533–534, 539.)

For his part, Williamson asserts that he heard some drivers talking about Castro and a subpoena. Hearing that, he went to Belaunzaran who showed him a memo [no copy in evidence] of a conversation between him and Castro. Williamson states that, after he saw that memo, he had no conversation with Castro about the topic of testifying and a subpoena. Further, Williamson denies telling Castro that he should not testify at a Board hearing, and denies telling Castro that the Union was no good. Finally, he never saw any Board subpoena that had been issued to Castro. (1:74–76; 4:646–648.) On the latter point, Castro testified that he never showed his subpoena to Williamson. (3:393.)

(2) Discussion

Crediting Castro over Williamson, I find that the incident occurred as described by Castro. I note that Williamson seemed careful to state that he never had any such conversation with Castro *after* Belaunzaran showed him the memo. Williamson never refers to the morning break which was just a bit over an hour after Castro had presented his subpoena to Belaunzaran at 9 a.m. Disbelieving Williamson’s denial (1:74) that Belaunzaran had told him that Castro had been subpoenaed to testify (a logical thing for Belaunzaran to do since Williamson supervised Castro and the drivers), I find that Williamson first learned orally from Belaunzaran shortly after the 9 a.m. meeting between Castro and Belaunzaran, and that it was not until after the 10:10 break conversation between Williamson and Castro that Williamson saw Belaunzaran’s memo. Indeed, it is quite possible that Belaunzaran did not prepare his memo, assuming that one exists, until much later that day when the rush of business had passed.

By telling Castro that the Union was “no good,” that he should “forget” about his subpoena to attend the Board hearing (on August 26, 1996), that he did not need to go to “court,” that Williamson would speak to Belaunzaran for Castro [on this matter], and that, if Castro did not honor his Board subpoena (if he did not “go to the court”), then “you and Leo [would have] no problem.” By implication, the converse also would be true—if Castro did honor his subpoena, he would be in trouble with [have “a problem” with] Warehouse Manager Belaunzaran. Not only are Williamson’s statements unlawful interference, as alleged in complaint paragraph 7, but they also constitute both a blatantly illegal threat of retaliation for exercising rights protected by the Act and an attempted obstruction of the Board’s processes. Neither of the latter was alleged, however, and I make no finding that they constitute unfair labor practices.

In sum, I find that, as alleged by complaint paragraph 7, Respondent PDI violated Section 8(a)(1) of the Act by Fleet Su-

pervisor Robert J. Williamson’s statements of interference which he made to Charging Party Jose Castro on August 23, 1996. *Tufo Wholesale Dairy*, 320 NLRB 896 at 896, 904–905 (1996); *Bobs Motors*, 241 NLRB 1236 (1979).

4. Implied threat of discharge

a. Facts

Complaint paragraph 6(c) alleges that, about October 24, 1996, PDI, by Belaunzaran, “impliedly threatened employees with discharge in order to discourage employees from engaging in union activities and/or to discourage employees from giving testimony in a Board proceeding.” PDI denies. Jose Castro testified in support.

At the close of the Government’s case-in-chief, and in conjunction with the General Counsel’s motion to conform, I denied (3:584) the General Counsel’s motion (3:579–580) to add the date of August 28, 1996 because the date was not tried by implied consent. There was confusion concerning whether Castro’s testimony about the October 24, 1996 incident, and a reference in his notebook (GCX 20) to a similar event on August 28, 1996, were about the same or different incidents. I permitted additional examination to an attempt to clarify this point, including details as to both dates so they could be compared in order to provide that clarification. (3:543–550.) As I ruled at trial, the evidence was to clarify, not to try by implied consent. (3:578–579, 583, 586.) As I also ruled, however, the parties could refer to the August 28 incident on brief in arguing corroboration, impeachment, or whatever, to the extent the August 28 event bears on other alleged events. (3:551, 586.) As we are about to see, October 24 and August 28 are not the only competing dates.

This October 24, 1996 event sometimes is referred to as the “Pablo Vargas incident” or the “Core department incident.” On this occasion, shortly before 4 p.m. (2:247; 3:429; 4:806), when Castro was on break, he heard Pablo Vargas call for him over the public address system. Vargas was (4:678), and is (4:736), a checker in the Core department. When Castro arrived at Vargas’ work station, Vargas pointed to a pallet of merchandise. Vargas apparently was complaining that Castro had left the pallet there and there was no ticket for the merchandise. Castro explained that he had not left the pallet there. He went to Vargas’ desk and began to check the tickets. Castro pointed out that the merchandise was not listed on any of his tickets.

At that point Bobby Bagler (4:810), Vargas’ supervisor (2:248; 4:678), came over and, in English (as interpreted to Castro by Vargas) asked what was happening. Vargas told Bagler that he had called Castro to resolve the discrepancy of the merchandise with no ticket. Bagler asked that Castro not take time away from the employees. Castro replied (in Spanish, with Vargas interpreting) that he had come over only in response to the call from Vargas, that Castro was on break, and that there was no problem. (2:246–248; 3:431–432, Castro.)

Castro then heard Fleet Supervisor Williamson call him over to gate 6 on the unloading dock, and Castro went there. (2:248–249.) According to Williamson, Bagler had called him. In Bagler’s office, Bagler explained that Vargas was not on a break, and when he, Bagler, went over to ascertain what was happening, Castro said they were locating the paper (ticket) for

a pallet unloaded from a night truck. (4:679–680.) Williamson testified that he told Castro not to disturb Vargas by talking with him when his is not on a break. (4:680.) At trial, Williamson explained that another person, “Ralph,” handles the paperwork for the pallets, and that “Ralph,” not Vargas, was the person Castro needed to be talking with, and not with Vargas at the latter’s work station. (4:679.)

Continuing his account, Castro explains that Williamson had called Roberto Diaz over to interpret for Williamson and Castro. In answer to Williamson’s question, Castro responded that he had returned at 3:45 p.m., that he was on break, and that Vargas had called him over to resolve a problem. “No,” Williamson commented, stating that Castro in fact was taking time away from an employee [who was working]. At that point Warehouse Manager Montgomery Belaunzaran arrived, and Castro told him that, he was on his break when Pablo Vargas had called him over to resolve a problem. Belaunzaran replied that he had called Williamson because Castro was making Vargas waste his time. “How can you tell me that when I’m in my break and I am cooperating with the company?” Belaunzaran then said they should continue their conversation in his office, to which they then repaired. (2:249–250.)

According to Belaunzaran, he happened to come up on a scene at the front shipping area where Bagler, Williamson, and Castro were having a “heated conversation.” Each of the three told Belaunzaran his version of events. Belaunzaran asked Castro to come into his office. (4:805–806.) In Belaunzaran’s office, Castro tried “to justify” his being back in the checking area of the Core department. (4:810–811.) The main reason, according to Belaunzaran, for his directing Castro into the office as that Castro had pulled out his “little book,” and which he had pulled out “a thousand other times,” and had begun writing down everything that Belaunzaran was saying. (4:811.) [Belaunzaran does not report what he said in the shipping area. He asserts that he was afraid he was talking too fast for Castro to write, and therefore he called him into the office. 4:811.]

In his office, Belaunzaran reports, he told Castro, “I’m going to repeat exactly what I said out there so you can get every word down. Because as far as I’m concerned, you know what you can do with that book.” (4:811.) Before the trial, Belaunzaran concedes, he had never seen Castro actually write in his book. (4:812.)

When they entered Belaunzaran’s office, Castro testified, Belaunzaran sat down, while Castro remained standing. Belaunzaran said he was tired of so many problems, and that he had been told that Castro was making a book of everything going on in the company. Not of what was going on the company, Castro replied, but of all the psychological pressure and emotional stress imposed on him by the mental games he and Williamson were doing against him. “Within one week,” Belaunzaran told him, “this is going to end,” that he was going “to resolve it” in one week. Castro then left. (2:250–251.) Castro concedes that he received no written warning about the incident, but simply the oral warning from Belaunzaran. (3:429.)

Acknowledging that he may have told Castro that he was “getting tired” of such incidents, and that “Enough is enough,” Belaunzaran denies saying that this is going to end, or be re-

solved, in one week. (4:812.) Neither Pablo Vargas nor Supervisor Bagler testified.

b. Discussion

With one exception, Castro testified specifically, in detail, and persuasively, in contrast to Warehouse Manager Belaunzaran and Fleet Supervisor Williamson. Based on that contrast, and Castro’s more favorable demeanor, I credit Jose Castro rather than Belaunzaran and Williamson. There is just one problem—Castro gave three, even four, different dates when this event occurred. The first, in line with the allegation, was October 24, 1996. (2:246; 3:428–429.) He recalls the date because it was “a few days before I was fired.” (3:508.)

But then it developed that the October 24 date was not entered into Castro’s “little book” (3:509) because (3:547) it was identical to another incident which occurred on August 28, 1996 (3:537, 549–550). In fact, Castro reports, August 28 is the correct date of the incident. (3:509–510, 513.) Or is it? Castro also places the “This is going to end in one week” conversation as occurring 1 to 2 weeks before his discharge (3:511) and on November 5 (2:364) the day before he was fired. In short, the record as to the (even) approximate date is not reasonably established.

Finding that the record fails to show that the incident occurred on, or even about, October 24, 1996, as alleged, I shall dismiss complaint paragraph 6(c).

5. Threat of discharge

a. Facts

Complaint paragraph 8 alleges that PDI, about September 9, 1996, by its consultant Peter Bassett, “threatened employees with discharge because they testified against PDI in a Board proceeding.” PDI denies. Jose Castro testified in support. Bassett did not testify, nor did attorney Charles Caulkins or Office Manager Luisa Pacheco (who are prominently mentioned by Castro). From Castro’s uncontroverted and credited testimony (in English), I find as follows.

About noon on Monday, September 9, 1996, some 12 days after he had testified in the first case, Castro was walking through PDI’s lobby on his way to the men’s room. At the reception desk stood Peter Bassett. Speaking to Bassett and extending his hand, Castro said, “Hi, Mr. Pete, how are you doing?” To this greeting and extended hand, Bassett responded: “Why are you here?” “I work,” Castro answered, adding, “This is my hand.”

Ignoring Castro’s extended hand, Bassett asked, “You don’t remember court?” “Yes, I remember court,” Castro replied, also reminding Bassett that he did not know much English. Bassett then said, “You are not my friend. You’re crazy.” To this Castro, withdrawing his extended hand, said “Forget it.” Bassett turned from Castro. (1:217–220.)

Toward the end of the day, around 5:30 p.m., as he was assisting in loading the night trucks, Castro was paged over the public address system to report to the office. Reporting to Belaunzaran, Castro was told that Belaunzaran had not paged him. As Castro left and turned the corner, he saw Bassett in Bassett’s old office. Although Castro tried to ignore Bassett as Castro was passing by, Bassett called for him to come in. Castro en-

tered and, in English, said to those present, “Good afternoon.” Seated were Bassett, attorney Charles S. Caulkins [PDI’s lead counsel in the first trial], and Office Manager Luisa Pacheco. Bassett said something, which Castro did not understand, and the others began to laugh. Castro told Bassett that he needed to return to work, and he asked Bassett what was the problem. Laughing, attorney Caulkins told Castro to return to work.

Castro turned and went to Belaunzaran’s office where he reported the incident and that he was being ridiculed and provoked. Castro asked Belaunzaran to let him work. Belaunzaran told Castro not to worry, that he would talk to them, and to return to work. (1:220–223.) As he “understood” that Bassett no longer worked for PDI, Castro testified that he did not know why Bassett was there that day. (1:220.)

b. Discussion

PDI argues (Brief 26) that there was no threat “express or implied.” (Emphasis added.) The General Counsel argues that an express threat is established, and if not, then an implied threat should be considered and found even though not specifically alleged because it was fully litigated. (Br. at 55.) As PDI, as shown, argues against any finding of an implied threat, I find that PDI has waived any argument that it has not impliedly consented to the matter being considered as fully litigated.

The General Counsel’s articulation of a threat, whether express or implied, is based on the background of an interrogation, a threat, Williamson’s pretrial threat in the subpoena discussion (as I have found in this case), Castro’s testimony, Castro’s difficulty in getting assurance that he could testify the second day, his being required to return to the warehouse at 8 a.m. the second day of his testimony to determine whether management would permit him to leave work to testify, plus management’s offensive conduct toward Castro on September 9, 1996 as described in this case. To the General Counsel, in the noontime encounter between Bassett and Castro on September 9, “Bassett makes it perfectly clear to Castro that he is declaring war on Castro.” (Br. at 53.) While not articulated, the General Counsel apparently is saying that Bassett’s declaration of war was soon ratified by mocking laughter by Bassett, Pacheco, and by PDI’s attorney, Charles Caulkins. This declaration of war, as ratified (so the argument apparently would be stated), is that Castro would be fired (in effect, interpreting Bassett to say, “You mean you’re still here, that you haven’t been fired yet for testifying against us? Well, I’ll see that PDI fixes that real quick.”) at the first opportunity because he testified against PDI.

Clearly Bassett’s noontime words and actions toward Castro on September 9 (not quite 2 weeks after Castro testified against Bassett, Pacheco, and PDI) and the remark with laughter mocking, I find, Castro in the late afternoon by the management group (one manager and two agents of management), were meant to notify Castro that he was no friend of PDI. More than that, the shock treatment of pure hostility served as a warning to Castro—and a declaration of war against him. In short, the handwriting was on the wall—his days at PDI were numbered. Bassett’s brutal noontime words and hostile conduct, and the later ridicule and mocking laughter, clearly were rude, ugly,

and mean spirited.⁶ But such conduct was not an express threat. However, under all the circumstances, I find that such conduct constitutes an implied threat of discharge, and that the implied threat was fully litigated.

Any matter tried by implied consent is automatically added to the complaint as a matter of law. FRCP 15(b). Moreover, the difference between an express threat and an implied threat, as an allegation, is of minor significance, for the common denominator is that a threat was made. The facts do not need to be stretched to fit some distant date, or different event. The same facts are addressed. It is only the legal argument which changes. Recognizing this, PDI includes an argument that no implied threat was made. The matter has been fully litigated. Agreeing with the Government, and disagreeing with PDI, I find, as alleged in complaint paragraph 8 (as modified by operation of law to include the allegation of an implied threat), that Peter Bassett, PDI’s consultant and statutory agent, violated Section 8(a)(1) of the Act by his combined statements and conduct, including his final remark and mocking laughter, toward Jose Castro on September 9, 1996.

In finding the foregoing violation, I also have considered Bassett’s statements to Castro from Bassett’s perspective. That is, assume that Bassett had testified and conceded the remarks. At that point he could have explained that his message to Castro was:

Jose, you and I know that you lied at the trial. No judge or jury could know that because they were not there with you and me. But you and I were there, and you know that you lied at the trial. Because you lied, I don’t want to have anything to do with you. I will not shake the hand of someone who lies against me, especially under oath. You are no longer my friend—not because you testified to what you believed to be true, but because you lied. You’re crazy.

There are two problems with that. First, it is inconsistent with Bassett’s later action in calling for Castro to come into the office [because that would be having something to do with Castro], where Bassett initiated the mocking of Castro which ensued. Second, Bassett did not take the witness chair to state his version and subject himself to cross-examination. I draw the adverse inference from his failure to testify that, had he testified and done so truthfully, he would have confirmed Castro’s testimonial version without offering the potential explanation set forth above. That is, he would have confirmed that his remarks were, indeed, a declaration of war against Castro.

Citing Castro’s “understanding” that Bassett no longer worked for PDI that September 9, PDI argues that it cannot be held accountable for Bassett’s remarks because Castro “knew” that Bassett “was not speaking on behalf of PDI” (reply br. at 9), and even that “Bassett no longer had authority to act on behalf of” PDI (br. at 26). First, regardless of Castro’s “understanding,” he could see that Bassett had enough influence with PDI to lead Office Manager Pacheco and PDI’s attorney in laughter mocking Castro. Second, as PDI amended its answer at trial (1:10) to admit Bassett’s statutory agency status at all

⁶ “Anger is never without a reason, but seldom with a good one.” B. Franklin, *Poor Richard’s Almanack* (1753).

material times, for the purpose of this proceeding, PDI's argument against agency is highly improper.

C. Alleged Violations of Section 8(a)(3) and (4) of the Act

1. Allegations

Complaint paragraph 9 alleges that, from about early September 1996 through November 6, 1996, PDI "imposed onerous working conditions on its employee Jose Castro by, inter alia [an irritating Latinism meaning "among other things"], verbally harassing him, changing his work assignments, increasing his work load, and placing his work under close scrutiny." PDI denies.

Complaint paragraph 10 alleges that, about November 6, 1996, PDI discharged Jose Castro. PDI admits.

PDI denies the further allegations that it took any of the alleged actions because of Castro's union activities or because he testified in the first trial, and further denies that it violated Section 8(a)(3) and (4) of the Act.

2. Background

a. Introduction

Castro testified (1:185; 2:234, 309) that his working conditions changed for the worse after he testified on August 26–27, 1996. PDI argues that Castro's conduct had begun to deteriorate long before he testified in August 1996. Thus, on May 4, 1995 Castro was suspended for 3 days because (according to the documents which PDI prepared, RXs 2, 3, 6) of insubordination, and a final warning (RX 4) on February 1, 1996 for an asserted additional insubordination on January 23, 1996. Conceding that no unfair labor practice charges were filed against PDI over the May 1995 suspension and the February 1996 final warning, Castro explains that he did report the discipline to Union Representative Monica Russo and trusted the Union to handle the matters. (2:287–288.) The General Counsel represents that by the time the NLRB's Regional Office became aware of the discipline it was too late, for the discipline fell outside the statutory limitations period. (2:284.)

As argued by the General Counsel at trial (2:283), such explanation bears on credibility. That means, presumably, that at all times Castro disagreed with the May 1995 and February 1996 discipline, and that his failure to file his own unfair labor practice charges then, as he did for this case, is not because he agreed with the discipline.

On the other hand, it can be argued that Russo investigated both disciplinary actions, concluded that discrimination could not be shown, and so advised Castro. Otherwise, it can be argued, when Castro went to the Union over his final warning of February 1, 1996, he surely would have asked Monica Russo, "What is the status of the charge you filed last year over my May 4, 1995 suspension?" Having observed Russo testify in the first trial, I am not prepared to accept (absent positive and persuasive evidence, of which there is none) the story that, not only did Russo goof once, but she fumbled the ball away a second time for the same Jose Castro.

How did Castro fare between the advent of the Union's organizing drive in May 1994 and his testimony at the first trial in August 1996? As I state much earlier, in the first case I found that then Division President Peter Bassett unlawfully interro-

gated Castro on May 9 (JD at 16), and (JD at 52) that, on June 20, 1994, Office Manager Luisa Pacheco unlawfully threatened Castro with unspecified reprisals for supporting the Union.

I divide the pre-testimony time into two periods—May 1994 through April 1995, and May 1995 through July 1996. That carries us almost to the time of Castro's testimony. During this period of over 2 years, no unfair labor practice charges were filed protesting any adverse actions against Castro. Although Castro, as discussed earlier, claims to have reported the May 1995 suspension and the February 1996 final warning to Monica Russo, the Union's representative, I found that, even assuming he so reported, Russo apparently investigated and decided against filing any charges. Finally, as noted, Castro asserts that his working conditions did not change for the worse until after he testified. Turn now to a summary of these background events.

b. May 1994 through April 1995

How did Jose Castro fare during the nearly 1-year period following the Union's appearance at PDI? Recall from my decision in the first case that, when Peter Bassett unlawfully interrogated Castro on May 9, 1994, Bassett already knew about the Union, whereas Castro did not. (JD at 14, lines 1–2, and 15, lines 36–37). Also, as I wrote there (id. at 16):

It was not until the following day, May 10, that Castro signed an authorization card (GCX 12–35) [GCX 10 here] for the Union (11:1777, 1781; 12:1843), and he was one of several employees who signed the letters (GCX 2a–2d, English and Spanish) [GCX 12–1 to GCX 12–4 here], dated May 12 and 19, to Bassett announcing the Union's organizing drive. (11:1786; 12:1841.)

Finally, Castro is one of the seven employees who appear in a photo (GCX 11) on a union organizing leaflet which supporters distributed at PDI within a month before the July 7–8, 1994 election. (1:136–137.) Fleet Supervisor Williamson testified in the first case that he was "shocked" to see Castro's picture among those openly supporting the Union. (JD at 49 lines 27–28.) In testifying, Williamson pretended to be confused as to the meaning of the presence of the employees in the photo, but he was not so confused when he angrily confronted employee Osberto Jerez on June 9, 1994 about the photo. (I dismissed the allegation only because, as there stated, of a variance from the allegation of an interrogation.) On that June 9, Williamson told Jerez that management "already knew the leaders of the Union." Among the five names Williamson listed for Jerez, Jose Castro's was the third. (JD at 49 lines 14–17.) Revealingly, Vivian Fortin's name was first and Ronald Casco's was second. Fortin and Casco were the Union's two observers at the July 1994 election. (JD at 87 lines 41–42.) A large part of the first case was devoted to litigation over Fortin's permanent layoff.

Casco was among those laid off in August 1994. (JD at 109 lines 38–39.) Thus, on that list of the Union's organizers already known by management, Jose Castro was number 3. By late October 1994, the first two—the Union's only observers at the July 1994 election—had been laid off. With both Fortin and Casco gone, that moved Jose Castro to the top of manage-

ment's list, as cited by Williamson on June 9, 1994, of the "known" leaders of the Union.

Despite these surface alarm bells, there is very little in the record about Castro's experience at PDI from May 1994 through April 1995. Indeed, Castro himself clearly states that his problems with Belaunzaran and Williamson did not develop until after he testified in August 1996. (1:193, 207; 2:234, 309.) I address such "problems" later. For now, I observe that, although Castro assertedly (2:309-310; 3:414, 494, 523-524) began maintaining his notebook (GCX 20) soon after he became involved with the Union's organizing campaign (recall that he signed his union card on May 10, 1994), there is no evidence (with one possible exception) that he recorded any incidents of maltreatment toward him through April 1995.

The possible exception pertains to a March 29, 1995 incident in which Supervisor Juan Castillo threw a punch at Castro. A food service, apparently by custom or arrangement, arrives at the rear of the PDI facility, and employees, it appears, go for coffee, toast, or whatever is available. On this occasion Castro went over and obtained some coffee and toast. The attendant asked if Castro would wait to take some food to Castillo. To Castro's question of whether it was ready, the attendant said no. Saying he was sorry, Castro left. Shortly thereafter, it appears, Castillo learned that Castro had not returned with Castillo's food. Castillo went over and threw a closed-fist punch at Castro who avoided the punch by falling backwards. Assistant Warehouse Manager Angel Gonzalez assertedly was a witness. The police were called. Although Castro reported the matter to Belaunzaran and to Freidli, and apparently to the police, no apparent discipline was imposed on Castillo. (3:447, 492-501, 515-523.) [This incident was described by way of explaining why Castro, later on, did not complain to Freidli about adverse actions against him. Castro felt it would be futile. 3:414, 447, 491-492.]

I attach no weight to the Castillo incident. It was not fully developed on the record. The obvious possibility is that Castillo denied the accusation, Gonzalez said he did not see anything, and, with Castro having no corroborating evidence, and no physical evidence such as a black eye, management and the police decided that there was nothing they could do. Turn now to the next time period.

c. May 1995 through July 1996

(1) Introduction

Although preceding Castro's August 1996 testimony, the May 1995 through July 1996 time frame is an important period. It begins with a May 4, 1995 3-day suspension of Castro for a May 3 insubordination to Fleet Supervisor Williamson, a threat of discharge by Belaunzaran in late 1995 [which, for convenience of reference, I shall treat as November 1995], a final warning on February 1, 1996 for a second insubordination to Williamson, this time on January 23, 1996, and a second discharge threat by Belaunzaran, this time about, roughly, May 1996.⁷

⁷ Other than Castro's testimony that the threat was made after the first occasion in late 1995 (2:357), and before he testified in August

On his first day as a witness, Castro testified that, on various occasions after his August 1996 testimony, every time he made a "claim" [asked for help or a favorable decision, apparently] to Belaunzaran, Belaunzaran's response was to say that he was the boss and could fire him at any time. (1:207.) By the second day the occasions had been reduced to three, and two (2:355, 360-363) of those, as shown during cross-examination, came before his August 1996 testimony. As mentioned in the preceding paragraph, the first of the two pre-testimony threats of discharge occurred (as I have dated it) in November 1995, and the second came (again, the date I give is for convenience) in May 1996.

(2) Suspension of May 4, 1995

A May 5, 1995 [a Friday] file memo by General Manager Phil Freidli and Warehouse Manager Leo Belaunzaran, summarizing PDI's version of the event, is in evidence (although not for the truth of the contents). Signed by management and also by Castro, the text [I have made some minor corrections] reads (RX 3):

On May 3, 1995 Jose Castro refused to follow [the] instruction of immediate supervisor Rob Williamson. The following is a summary of the action along with the investigation of the insubordination. During the morning of May 3, Rob Williamson along with Albert Heard were unloading night trucks which is a normal process for someone to do on a daily routine, along with Jose Castro and Orlando Noriega unloading day trucks. Jose and Orlando unloaded two trucks together and Orlando one by himself. Orlando positioned a truck for unloading and started the process. When Jose arrived he was instructed to help Orlando and at this time Jose refused. Rob made several requests for Jose to help and with Albert, Orlando and Pablo [Vargas] present Jose continued to refuse and argued with Rob. Rob instructed Jose to either unload the truck or take the day off. This was done with Angel Gonzalez present (asst. whse. mgr.). Jose said that Leo [Belaunzaran] (whse. mgr.) told him that he did not have to follow Rob's instruction. This was never told to Jose by Leo.

In reviewing the facts from witnesses, Albert Heard, Orlando Noriega, Rob Williamson, [and] Pablo Vargas, the findings are as follows.

(A) Albert Heard said there were several requests by Rob to Jose to unload the truck and that Jose did refuse.

(B) Orlando Noriega said that Rob requested 3 to 4 times for Jose to unload the truck and that he refused.

(C) Pablo Vargas is a returns department worker who was back in the unloading area at the time. He agrees that Rob made several requests to Jose and that he refused.

(D) Jose Castro admitted, "he was not following Rob's request" [,] that he stated he was trying to tell Rob why it was not Jose's job duty to unload the truck.

1996 (2:360-361), nothing gives the date. My selection of May 1996 is for convenience of reference.

Jose's reason not to unload the truck was because this was a day truck that should be unloaded by that driver. The decision who unloads is up to the supervisors in order to balance the work loads in an efficient manner. There are several cases in Jose's file on other acts of insubordination. On May 3, 1995 he was suspended for three days without pay.⁸ The facts show that Jose was insubordinate to a supervisor and this will not be tolerated. Any future acts by Jose that do not follow company policy will result in discharge. He will be allowed to come back on May 8, 1995.

Although Castro signed the document, he added a protest (in Spanish), translating to (3:463, 480): "I signed under protest because of the lies that are written in this paper." Castro (3:464, 466) denies the accuracy of the memo's version, states that he was never insubordinate to a PDI supervisor, and asserts (3:479-480) that Angel Gonzales and Albert Heard were not present as claimed in the report.

Castro's version of the event is that, as he and Orlando Noriega were unloading a truck, Noriega told him that Williamson was "fired up." (2:274.) As they finished unloading the first truck, they decided that Castro should move it to the parking lot to make room for the second truck. When Castro returned, Williamson was there with Albert [Heard]. Williamson asked Castro what "was happening to me." "Nothing," replied Castro. "You're suspended three days," Williamson responded. (2:275-276.) Actually, the suspension did not come until the next day, and that was by Belaunzaran. (2:276-277.)

Williamson's version (4:649-651, 660-661, 731-733) is consistent with that quoted above from the file memo. I particularly note that Williamson persuasively testified, on cross-examination (4:733), when asked what language Castro used when telling Williamson such remarks that it was not his job to unload the truck, "He told me I wasn't his boss in English." In this connection, the record reflects that Castro, because he speaks only limited English, had a tendency to want to go to Belaunzaran when any difficulty arose. As Castro himself explains, "Mr. Belaunzaran speaks my same language. And ever since he took on his position, his work position, I thought that he was my good friend; since he told me the doors would be open any time I needed something." (3:394.) Belaunzaran confirms that he has an "Open Door" policy. (1:34.)

Williamson testified that Gonzalez, Heard, and Noriega no longer work for PDI, but that Pablo Vargas does. (4:736.) No party saw fit to call Vargas as a witness.

Belaunzaran testified that he investigated and spoke with the witnesses, and that they corroborated the version of Williamson. Belaunzaran felt that a suspension was needed because of previous insubordination problems with Castro, and that talking to him seemed to do no good. (4:815-816.) Although Castro took the stand as a rebuttal witness (5:951), he did not address

any of the specific items (including Belaunzaran's assertion of previous insubordination problems) mentioned by Williamson and Belaunzaran.

On this topic, I credit Fleet Supervisor Robert Williamson and Warehouse Manager Leo Belaunzaran—not necessarily as to all details, but respecting the general nature of the incident. I do so even though I generally have not been favorably impressed with either (especially Williamson) as a witness, either in the first case or in this second trial. But Castro's story here, besides appearing to be grossly incomplete, just makes no sense. Remember, this was nearly a year after the election. Apparently nothing substantially adverse to Castro had occurred since the election. And there is no evidence that the three nonsupervisory employees mentioned as witnesses (Heard, Noriega, and Vargas) were aligned against Castro, either as to the Union or for some other reason, so that they would lie against him. Castro's protest of "lies" is no substitute for facts that support his contention and the Government's allegation. In short, the evidence fails to show any unlawful motive respecting Castro's suspension of May 4, 1995 for insubordination to Fleet Supervisor Robert Williamson.

This is a bad omen for Castro's case. I am reminded of my observation at trial (2:285): "The Respondent has this now, and has a background of a suspension in 1995, a final warning in January of 1996. That's pretty formidable obstacles that the General Counsel faces. Now, to what extent the General Counsel is going to neutralize that, I don't know." Turn now to the next incident.

(3) November 1995 discharge threat by Belaunzaran

Castro places Belaunzaran's first discharge threat as following a meeting of Belaunzaran with the drivers in a hallway near the main gates (at the loading dock) concerning mistakes that had been made that day. Belaunzaran was upset and apparently chewed out the drivers as a group, although Castro, confident that he had not made any of the mistakes, did not think that the criticism was directed at him. Castro dates the meeting as falling a "long" time after his May 4, 1995 suspension, but before his February 1, 1996 final warning. (2:355-358.) For convenience, I simply refer to it as having occurred in November 1995.

As Castro himself tells us, as the meeting ended and everyone began leaving, Castro jokingly commented to "Jack" (a driver no longer employed at PDI), "Be good so you don't get punished." Too late Castro noticed that Belaunzaran was standing nearby and had overheard his comment. Belaunzaran told Castro, "This is not something to laugh about. I could fire you right now." (2:359.) Although Castro said he had not been laughing at Belaunzaran, but merely joking with "Jack," Belaunzaran turned and left. Over the next couple of days Castro unsuccessfully tried to explain to Belaunzaran, until Belaunzaran finally told Castro to "Forget it." (2:359-360.) Not surprisingly, Belaunzaran apparently saw no need to address this incident during his own testimony as PDI's witness.

This incident tells us four things. First, any threats by Belaunzaran to fire Castro did not begin after Castro testified, for Belaunzaran had made them before such testimony. Second, the admitted nature of the incident shows that Belaunzaran's

⁸ Wrong. The suspension came on May 4, 1995 and was for the dates of May 4, 5, and 6, 1995. (RX 2; 3:478, Castro). Castro returned to work on Monday, May 8, 1995, when he signed the file memo, RX 2. (3:462-463, 479).

threat of discharge had nothing to do with any union activity by Castro. Third, Castro's flippant attitude toward, and mocking remark about, the serious topic which Belaunzaran had been discussing with the drivers angered Belaunzaran. Fourth, if Belaunzaran had been looking for an excuse to build a case against Castro in order to get rid of him when the last step was reached in PDI's system of progressive discipline, then Belaunzaran strangely goofed when he told Castro to "Forget it." Instead of cooling down from his level of anger, Belaunzaran could have seized on the golden opportunity, presented to him on a silver platter by Castro, and imposed a warning (oral or written) or suspension for insubordination. Instead of zapping Castro, Belaunzaran voluntarily dropped the matter. This is hardly consistent with the Government's theory of the case. That takes us to the next incident.

(4) February 1, 1996 final warning

(a) *Facts*

The next incident occurred January 23, 1996. On that date Fleet Supervisor Williamson submitted his written (RX 5) recommendation to Belaunzaran that Castro be suspended for 3 days. (4:653.) Williamson's trial description (4:654, 715-730, 758) of that matter, and the steps he followed in submitting his recommendation, while in more detail than his written recommendation, is essentially as stated in his recommendation memo. The facts-text of that memo provides (RX 5, with minor corrections):

I asked Jose to move away from the loading dock area while he's on his lunch break because he was standing between loading doors 2 and 3 interfering with the other drivers trying to work. So I asked him to move into the office or outside, or lunch room, so he would not interfere with the other drivers that are loading trucks. And when I asked him to move he raised his hand in a manner like he was ready to slap me.

One detail missing from the written recommendation memo is that Castro was talking with night driver Ricardo Maradiaga in a location, and in a manner, that interfered with those trying to load the trucks. Maradiaga testified as a rebuttal witness for the Government in this proceeding, and Antonio Gutierrez was called for surrebuttal by PDI. Gutierrez is a receiving clerk who, it appears, was helping to load Maradiaga's truck that January 23, 1996.

On this occasion, Gutierrez testified, Castro came to the truck and conversed with Maradiaga. For about 5 minutes, Castro was so positioned that he was in Gutierrez' way as Gutierrez was loading the truck. Gutierrez paid little attention to what they were discussing because he was more interested in his loading work. After that first 5 minutes, Gutierrez saw Fleet Supervisor Robert Williamson appear. Standing about 6 feet from Castro, Williamson, in a normal tone of voice, asked Castro to move because "You're in Tony's way." Castro, in a voice somewhat elevated, and gesturing out with his hands, asked why Williamson was directing only Castro to move and not also other drivers who were in other trucks. Because of his loading duties, the only words he heard said after that were by Maradiaga to Castro, "Come on Castro. Just move. Don't pay attention to this nigger." Gutierrez does not think Williamson

heard the remark, which, in any event, was in Spanish. In fact, Gutierrez does not recall whether Williamson was still there at the moment. After Williamson asked Castro to move, Castro did move out of Gutierrez' way. (5:973-984.) Williamson (4:649, 733) advises that he understands only a little Spanish—some common greetings and a few vulgar words.

Castro describes a different scene. He testified that, around 6 p.m. after he had returned from his driving run and was taking his break at the loading dock talking with driver Ricardo Maradiaga, Fleet Supervisor Williamson screamed at Castro. Williamson screamed from his position at gate 6 to Castro who was near gate 1, some 150 feet away. Williamson screamed for Castro to move, that he was interrupting work. "Since I continued talking with Mr. Maradiaga, he [Williamson] came towards me." When Williamson came over moving his hands, Castro asked him what was happening. Williamson told him to move. Castro and Maradiaga then moved. Asked why he did not move when Williamson first yelled at him, Castro replied that it was because of the domineering manner in which Williamson had yelled in front of several employees who were present. Castro testified that he and Maradiaga were standing by gate 1, where no loading is done. (2:279-283; 3:411.) Castro initially testified that he had listed the incident in his notebook (3:411), but later (3:535) had to concede that he had not done so.

Ricardo Maradiaga worked as a night driver for PDI from mid-July 1993 to mid-February 1997. (4:873-874.) One evening (he does not recall the date, 4:899), about 30 minutes to an hour before his 7 p.m. shift started, he was at PDI observing the loading of his truck. That is, he was there to observe what he could from a distance, for within had instructed Maradiaga (and presumably the other drivers) not to go near the trucks. (4:875, 898.) He was conversing with Castro, at a point he marked on a diagram (RX 1), some 10 to 15 feet to the nearest loading door. No loading was occurring where they were standing. (4:878.) Pullers and checkers were by the conveyors, over 30 feet away. (4:901-902.) Maradiaga was one of five drivers there, and he always went to observe (to the extent he could) the loading of his truck. (4:897.)

Maradiaga and Castro had been talking some 5 to 10 minutes when Williamson approached. (4:902.) No other employees were talking with them. (4:880, Maradiaga.) The closest employees were those loading the truck, some 10 to 15 feet away. (4:880.) One of that group was a worker from Guatemala, a short man, about 20 to 22, who was overweight, whose name Maradiaga does not recall. (4:891, 894-895.)

When Williamson was about 20 feet from Castro and Maradiaga, he screamed to Castro, asking why Castro was not working. "Because I'm on my break," Castro replied. (4:879.) Williamson approached to within 5 to 7 feet (4:886, 890) and said to Castro, "Stupid shit." (4:879, 888, 899. Maradiaga.) Williamson then left, walking toward Belaunzaran's office. (4:879, 886, 895.) Williamson, Maradiaga testified (4:892), normally spoke to the Hispanic employees, including himself (4:899), as "shit Hispanic, shit," in that fashion. After Williamson departed, Castro and Maradiaga talked for another 1 or 2 minutes, and then they went separate ways. (4:902-903.) Maradiaga asserts that at no time did Castro raise his hands as if to strike Williamson. (4:889-891.)

Maradiaga concedes that he was unhappy with all of the Miami management for failing to assign route “S” to him (4:900–901), that (4:907) he has consulted an attorney regarding a possible workers compensation lawsuit against PDI, and (4:908–910) that he once complained to Belaunzaran that he was so mad he could break open Williamson’s head because Williamson was treating him as [or calling him, or both] “stupid” and a “shit.” [Although the interpretation is rendered as “I decided to break his head open,” 4:910, the context shows there was no intention of such, and that it was an expression of frustration and anger, so that the correct meaning is as I have stated.] Maradiaga denies having ever made any threat about Williamson (4:908–909), and (4:907–908) denies ever having referred to Williamson as the a “son of a prostitute, or of having done so when speaking with Belaunzaran.

Warehouse Manager Belaunzaran testified that he investigated the incident and concluded that, once again, Castro had been insubordinate to Supervisor Williamson. Although Williamson recommended suspension, Belaunzaran decided against that, thinking that a second suspension would not help teach Castro. Instead, Belaunzaran opted to issue a final warning. This he did in the form of RX 4 which he prepared and presented on February 1, 1996. (4:843–851; 5:947.)

Even though Williamson told him that Maradiaga was present at the incident (4:842), Belaunzaran admits (5:936) that he did not interview Maradiaga as part of his investigation. Indeed, Belaunzaran concedes, he did not even obtain Castro’s version. (4:849; 5:936–937.) Asked why not, Belaunzaran replied that, as to Maradiaga, Belaunzaran had “no particular reason,” for he “had enough information.” Respecting the failure to interview Castro, Belaunzaran asserts (5:937):

There were enough impartial people present at that time that they would corroborate the truth of the matter,⁹ and that’s why I didn’t ask Mr. Castro for it, and neither did I take any actions against Castro for what happened.

On both direct (4:847) and redirect (5:948) examination, Belaunzaran asserts that he gave Castro the “opportunity” to respond to the statement (charge) in the warning document (RX 4), and that Castro did respond with the statement he wrote at the bottom of the document. That statement reads (3:842, Castro):

I don’t agree with what is written because Ricardo Maradiaga was not called and he was not present.

Belaunzaran concedes that, at this meeting he did not ask Castro for his version. (5:948–949.) Castro (3:412) asserts that he (apparently at the meeting) asked Belaunzaran to interview Maradiaga, but that Belaunzaran ignored his request, and, instead, “limited himself to getting testimony from others.” “And in my warning,” Castro continues (3:412), “I affirmed and I signed that all of that was a lie.”

On rebuttal Belaunzaran testified that, in conversations with Maradiaga, Maradiaga repeatedly would refer to Fleet Supervisor Robert Williamson as a “dumb nigger” and a

“worthless sonofabitch” who did not deserve to be a supervisor. At each of these offensive outbursts Belaunzaran would reprimand Maradiaga by telling him that such was “uncalled for,” not necessary, and that he was not to make any derogatory comments about a supervisor. The reprimands all were oral, for Belaunzaran never issued Maradiaga a written reprimand for such conduct. (5:959–960, 967–968, 970–972.) [As a former senator from Illinois might phrase it, “A reprimand here, a reprimand there, and pretty soon you’re talking about a real wrist slapping.”]

Belaunzaran eventually prepared a file memo (RX 10, dated December 16, 1996) to document that Maradiaga, as on at least two previous occasions, had said he was going to break open Williamson’s head. At each of these expressions of potential violence against a supervisor, Belaunzaran reprimanded Maradiaga. (5:971.) The file memo, however, contains no reference to a reprimand, even of the “conduct uncalled for” variety. Belaunzaran did not fire Maradiaga because Belaunzaran considered that Maradiaga possibly was just “blowing off steam.” (5:971).

(b) Discussion

Respecting Williamson’s claim that Castro raised his hand as if to slap or hit Williamson, I do not credit Williamson. What I credit is a composite of the evidence, for no one witness testified convincingly as to everything about this incident. Thus, I find that, from a considerable distance, Williamson shouted [“screamed” implies intentionally too loud for a short distance, whereas a shout would be necessary to project the voice over a long distance with normal noise on a loading dock] for Castro to move, that he was interrupting work. As Gutierrez credibly testified, Castro in fact was so positioned as to be in Gutierrez’ way as Gutierrez was loading Maradiaga’s truck. As he testified, Castro did not move as ordered by Williamson.

As Williamson drew to within about 20 feet, he again shouted to Castro, asking (as Maradiaga testified) why he was not working. Castro answered that he was on break. When Williamson arrived to about 5 to 7 feet from Castro, he told Castro to move out of Gutierrez’ way, “[you] stupid shit.” Castro began to argue, asking why Williamson was singling him out from the other drivers. At that point (as Gutierrez testified) Maradiaga told Castro, in Spanish, “Come on Castro. Just move. Don’t pay attention to this nigger.” Castro moved, and Williamson went to see Belaunzaran. By the time Belaunzaran arrived on the dock, Castro was gone.

As the credited evidence reflects, a substantial amount of mutual disrespect exists, or did so during the relevant time, between Supervisor Williamson and at least some of the Hispanic drivers. Williamson spoke to them in crude language laced with ethnic slurs. In private, they returned the insults with racial slurs.

From his own investigation, limited as it was (he did not interview either Castro or Maradiaga), Belaunzaran apparently concluded there was no merit to Williamson’s charge that Castro had raised his hand as if to slap or hit Williamson. In any event, as Belaunzaran testified, he imposed no discipline on

⁹ The record does not show whom, other than Williamson, Belaunzaran interviewed.

Castro on that portion of the incident,¹⁰ and confined the final warning to the insubordination aspect of Castro's ignoring Williamson's order to move. The limited basis of the final warning is consistent with the findings I make here.

The real question is whether the Government showed unlawful motivation here. I find that it did not. While Williamson blew out of proportion Castro's hand gestures when Castro asked why Williamson was picking on him, Williamson's intent at that point is not developed. For example, the evidence fails to show that Williamson ignored other drivers assertedly talking on the dock,¹¹ and whether the other drivers had openly opposed the Union just before the July 1994 election. Indeed, at trial the General Counsel addressed both this incident, and the suspension of May 1995, just briefly, because they are listed in the discharge memo (discussed later), shortly before tendering Castro for cross-examination.

On brief the General Counsel argues that Williamson "fabricated" the incident. (Br. at 61.) But Castro's own version shows that he ignored Williamson's shouted order to move [at 150 feet, Williamson had to shout], and began protesting of unfairness *before* moving when will arrived at Castro's position. [The old adage fits: "Comply now; grieve later."]

Does Williamson's distortion of the hand gestures reflect an unlawful motive? Possibly, but it also would be consistent with other motives, such as ballooning the incident in order to help obtain a favorable review by Belaunzaran of Williamson's suspension recommendation.

Does Belaunzaran's failure to interview both Castro and Maradiaga reveal an unlawful motive? Perhaps. Belaunzaran testified that he typically interviews all witnesses, including "the person involved," taking notes and sometimes taking statements from witnesses as he gathers "all the information I can" in order to make a judgment on what happened and how it can be avoided (in the future). (1:33; 5:937-938.) Indeed, as Belaunzaran states about the discharge incident of November 5, 1996, "I go to the person involved." (5:938.)

Belaunzaran's excuses for not interviewing Castro (already had corroboration from impartial witnesses) and Maradiaga (already had enough information) are directly contrary to his admitted procedure. They ring hollow. Nevertheless, that does not automatically convert his nontypical investigative procedure here into an unlawfully motivated technique. At this point it is useful to recall Belaunzaran's November 1995 "Forget it" attitude toward Castro's flippant joke mocking Belaunzaran. On that occasion Belaunzaran bypassed a perfect opportunity to add a legitimate warning to Castro's file. Why did Belaunzaran depart from his standard investigative procedure concerning this January 23, 1996 incident? Was he suddenly motivated by union considerations not to interview Castro and Maradiaga? If

so, what union activities had occurred since November 1995 and late January 1996 to generate an unlawful motivation behind Belaunzaran's failure to interview Castro and Maradiaga? The General Counsel does not point to any.

The evidence is simply inconclusive. Because it is, and in the absence of any evidence showing some union-related considerations developing after the November 1995 "Forget it" incident, I see no basis for finding that Belaunzaran was unlawfully motivated in failing to interview either Castro or Maradiaga. I therefore turn to the next incident.

(5) May 1996 discharge threat by Belaunzaran

(a) Facts

As I explain in the introduction section for this topical period of May 1995 through July 1996, while, for the purpose of convenience, I have fixed the date for this second discharge threat as occurring in May 1996, the significant point respecting the date is that it is Castro who testified that the incident occurred *after* the first threat in late 1995 and *before* he testified in August 1996. (2:357, 360-361.)

Castro testified that Belaunzaran delivered this second discharge threat to Castro as the two were conversing in Belaunzaran's office. As with his trouble recalling the date of the incident, Castro does not recall the specific point that he and Belaunzaran were discussing. All Castro remembers, as to the topic, is that Belaunzaran was "upset" with Castro over something and Castro was "trying to explain." (2:361.) Belaunzaran and Castro both apparently were agitated and speaking loudly, for Office Manager Pacheco came to the door and sternly asked both whether they "could handle this by lowering your voice[s], since there's people here working and we cannot concentrate?" (2:362.)

Although Castro does not remember why Belaunzaran was upset with him, he does recall that he (Castro) was not apologizing for what he had done, but that he was "trying to explain" the matter to Belaunzaran. (2:363-363.) Eventually, Belaunzaran told Castro (2:363):

I'm already tired of so many things. I want to see Jose Castro the way he was before or I will fire you.

Belaunzaran did not explain what he meant by his expression of wanting to see Castro the way he was "before," and Castro did not ask. (2:363.) Actually, it apparently was at about this point that the conversation ended, for it was Pacheco's appearance at the door and her scolding of the two that ended the conversation. (2:364.) Belaunzaran did not address this incident during his own testimony, nor does the General Counsel in the Government's brief (although PDI does in its brief).

(b) Discussion

This event tells us some things, but not everything. First, once again, even after the "final" warning of February 1, 1996, Warehouse Manager Belaunzaran has bypassed an opportunity to discipline Castro. Whatever explanation Castro offered that day, it clearly did not satisfy Belaunzaran, for Belaunzaran told Castro that he wanted to see improvement or "I will fire you." Thus, had Belaunzaran been out to get Castro because of the latter's union activities, he once again goofed. Objectively, we

¹⁰ I so interpret his testimony of taking no action. (5:937) Clearly he issued a final warning (although not the suspension recommended by Williamson), but the questions at this point (5:936-937) pertain to Castro's allegedly raising his hand.

¹¹ The bare reference, in Castro's protest, to other drivers doing such would be hearsay if offered to prove that the other drivers were impeding the loading process as was Castro. That is because Castro was describing what he said to Williamson. He was not testimonially describing what was happening on the loading dock.

do not know whether the opportunity was a “golden” one because we do not have the facts. Nevertheless, it is clear that Belaunzaran was not satisfied with Castro’s explanation. Had Belaunzaran been unlawfully motivated at that point, it would seem that he would have imposed discipline, possibly discharging Castro inasmuch as this occurred after the “final” warning of a few months earlier.

Second, the expected improvement was to reach Castro’s own standard that existed “before.” Before what? The record does not expressly tell us. Was it before Castro’s involvement with the Union? Before the pre-May 1995 “insubordinations” assertedly noted in Castro’s personnel file? Before the May 4, 1995 suspension? Had Castro, as PDI rhetorically asks (br. at 29), been “performing poorly”? Was Belaunzaran, in effect, telling Castro, “Before you began supporting the Union, you did good work. I don’t care a hoot that you supported the Union because, as you know, we both signed union cards. But since that time your interests have changed, and now you frequently are insubordinate to Robert Williamson, who is your supervisor. I’ve had enough of that, and I’m tired of it. I want you to return to your former standard of good conduct, or I will fire you.” That Belaunzaran was, in effect, so telling Castro seems to be a reasonable inference to draw from the evidence. I draw that inference.

Third, note that Castro was not apologizing, but “explaining.” Perhaps, objectively, Castro did not need to apologize. However, by his own admission (disobeying an order to move because it was delivered in a “domineering” fashion), Castro at times sees things only his way. To some extent, this trait is reflected in an irritating tendency, as I previously noted, of not answering questions directly. [Indeed, several times at trial I had to direct Castro to answer a question directly. See, for example, 2:360, 366; 3:409, 439, 470, and at other times I granted motions to strike his answers as nonresponsive, as at 2:306–307, 317; 3:435.] In short, contrary to the General Counsel (4:620), I see a connection between the two, and that is a factor to be considered when resolving credibility conflicts.

Fourth, this incident brings the accumulated total of formal and informal disciplines for this pivotal year to four—a suspension, a “final” warning, and two informal warnings of discharge. All in all, that is rather heavy baggage for Castro to carry into the critical period which begins when he returns to work after testifying on August 26–27, 1996.

3. Events between testimony and discharge

a. Introduction

Recall that the pertinent allegation here (complaint par. 9) is that from about early September 1996 through November 6, 1996 PDI “imposed onerous working conditions” on Jose Castro by (1) verbally harassing him, (2) changing his work assignments, (3) increasing his work load, and (4) placing his work under close scrutiny.

Recall also Castro’s testimony that, after he testified, conditions at work quickly became adverse, physically and mentally, and psychologically distressing. (1:185.) Thus, more work and psychological pressure were imposed on him, as will be discussed. In addition, whereas in the past Belaunzaran, on request, would explain things to Castro, now he would avoid

Castro. (1:191, 193; 2:351–353.) Similarly, whereas in the past Belaunzaran would compliment Castro for such things as having a clean truck, he never did so after Castro testified. (1:215–216.)

b. Verbally harassing Castro

In support of this allegation, Castro has two principal complaints. One is that after General Manager Freidli issued an order (1:185, 187; 2:340–342; 3:445) in early September that drivers were not to go into the warehouse zones, places where the merchandise is stored (1:206; 4:675), Williamson frequently would “scream” at Castro, telling him, in the presence of other drivers, to go into the zones to check and see if ordered merchandise was ready. (1:186.) When this happened a few days after he testified, Castro pointed out that Freidli himself had ordered drivers not to go into the zones. Williamson said he was the boss and that Castro was to do as Williamson ordered. The other drivers told Castro to obey even though Williamson was wrong. (1:186–187, 205–206.) Denying that he ever told any driver to go into the zones, Williamson testified that such has been a standing order for years to reduce theft. He acknowledges that the order came from Freidli. (4:675–676.) The General Counsel argues that Williamson is not to be believed because neither Freidli nor Belaunzaran have been in their positions “for years.” (Br. at 58.) However, Castro concedes at one point (2:342) that Belaunzaran also sent other drivers into the zones. Castro was not reprimanded (2:342), and there is no evidence that any driver was reprimanded for going into the zones. Later, on redirect examination (3:505–507), Castro asserts he was never a witness to any other driver being ordered into the zones. I do not understand that to contradict his earlier testimony that he saw other drivers going into the zones and that he understood it was at the direction of Belaunzaran.

Crediting Castro, and disbelieving Williamson’s denial, I find that Williamson, on some occasions soon after Castro testified, screamed at Castro, in front of other drivers, while ordering him into the zones. However, the evidence shows that other drivers also were sent into the zones. No reprimand was issued to any of them. Supervisors apparently had authority, in their discretion, to direct employees into the zones. (4:675.) While someone should have told the drivers of that discretion, Castro was treated no worse than the other drivers. Accordingly, this ground of the allegation is without merit.

A second complaint is that Williamson began to humiliate him at drivers’ meetings, and began speaking to him in vulgar language. While Williamson frequently would speak to other drivers in vulgar terms, he had not done so to Castro before Castro testified. Now he included Castro. Thus, at a drivers’ meeting on October 7, 1996, Williamson began berating Castro that he had left tickets behind. Castro replied that he had done so at Williamson’s direction. Williamson directed the group to go to the posted clipboard so that Castro could show everyone the tickets. When they arrived at the clipboard, which was empty, Castro stated that such was the way it was the day before. Williamson told Castro, “Fuck you.” This was the first (and only) time Williamson had ever said that obscenity to Castro, although he had said it to other drivers. (2:236–238,

244, 296–297.) Castro made no entry about this meeting in his notebook. (3:534.)

Castro's account of this incident appears to be garbled in some way in view of the fact that the clipboard was empty. In any event, Castro discloses that for years Williamson has berated drivers at meetings, and began including Castro with the others shortly after the 1994 election. At times, when he was upset with one of them and in a bad temper, he would grab his crotch and call the driver a "pinga," the Spanish slang word meaning "prick." (2:297–300.)

At a drivers' meeting on October 21, 1996, Williamson reprimanded Castro for failing to deliver a tail pipe to a customer. Castro said he had. Williamson permitted Castro to go into an adjacent office to call the customer. When Castro began speaking to the customer in Spanish, Williamson grabbed the telephone from Castro, telling him, "Speak English. This is my country." Some 9 to 10 drivers were in Williamson's office. Apparently Castro was situated so that the other drivers could see and hear. (2:239–243; 3:411, 425–428.) This incident is not recorded in his notebook. (3:534–535.) Although Castro asserts (2:288) that the occasion was the only time he ever heard Williamson make that remark to any of the drivers, he concedes (3:411) that even before he had testified that Williamson had told him to "Speak English." Castro reported the pulling-the-phone-away to Belaunzaran, as he assertedly had done respecting the "Fuck you" insult. He asked Belaunzaran to stop this conduct by Williamson. "Like always," Castro testified, Belaunzaran said, "Don't worry, I'm going to investigate that." (2:245.) [The "Now I'm asking you, how come you never investigated that?" at 2:245 was a question the witness directed at trial to Belaunzaran who was seated at counsel table.]

For his part, Williamson denies all. (4:648–649, 733.) Castro testified more persuasively, and I credit him. Even so, the proof of the allegation seems lacking. Castro concedes that Williamson has berated drivers at meetings for years. While Williamson began including Castro after the election, the allegation is that it began 2 years later, in response to Castro's August 1996 testimony. The pulling-the-phone-away incident was a one-time event, as was the "Fuck you" obscenity. The fact that Williamson's gross behavior spilled over and affected Castro once or twice after his testimony seems to fall short of an allegation of harassment. Moreover, Castro admits that, even after his testimony, he visited socially at Williamson's home on some occasions, once in connection with a car Castro's son planned to buy, and on a couple of occasions when Castro accompanied Williamson to buy some fish. (3:395–404.) Castro later explains these visits as occurring because he still thought that Williamson was his friend, and that Williamson was just following orders to harass him. (3:501–506, 524–525.) As noted, I find support lacking for this portion of the allegation, and I shall dismiss complaint paragraph 9 as to the verbal harassment.

c. Changing Castro's work assignments

For about the first 2 weeks in September 1996, Castro was switched from his regular route to alternate assignments of driving that route plus four additional ones. He never drove more than one route per day, he worked the same hours, and

(presumably) lost no pay. As one of two senior drivers, Castro was cross trained on all such routes. Castro feared that it was a ruse to catch him in a mistake so PDI could fire him. When Castro asked Belaunzaran for an explanation, Belaunzaran told him that he should be "proud" that he was the only driver who knew all the routes. Castro denies Williamson's assertion (4:643–644) that he had volunteered to drive other routes when such help was needed. After Castro complained to Belaunzaran, Castro was restored to his regular route only. (1:189–191; 2:304–305, 343–351; 3:484, 506.) There is no evidence that any drivers missed work during this 2-week period.

Although Belaunzaran thinks the alternating assignments of five routes in a 2-week period would be unusual, it happens, and he also asserts that there could be several legitimate reasons for it, including sickness and vacation. (4:763, 765.) Williamson testified that only two senior drivers, Castro and one other, were cross trained to drive other routes, and that Castro often volunteered. During 1996 Williamson had to ask Castro and the other senior driver if they would take other routes. Williamson does not recall specifically about the first 2 weeks in September. (4:642–643, 646, 707–708, 711–712.) Williamson denies, in effect, that such alternating assignments would be unusual (but is unable to specify which five routes the other senior driver ever covered), and stresses that his job is to see that the routes are covered every day. (4:712, 714.)

Certainly the circumstances here appear suspicious, and PDI's defense is rather feeble. (As an example of the latter, one would think that PDI would have offered driving records to show a past practice supporting the 2-week assignment to Castro, plus time records showing which drivers missed work during this period.) Although I credit Castro's account (I do find that he had been cross trained, whether by volunteering or otherwise), the real issue is whether there is something other than timing and the unusual nature of the alternating assignments to show an unlawful motive. In the absence of evidence that one or more drivers missed work during this 2-week period, the standard presumption prevails that the preexisting situation (all drivers working) continued. No adverse impact resulted, such as longer hours or reduced pay, and Castro's original route was restored when he complained.

Castro (1:190; 2:350) and the General Counsel (Brief at 59) speculate that the purpose of the alternating assignments was to put him on routes other than his regular route, let him make a mistake on the routes not his regular routes, and then fire him for the mistake. Nothing to that effect was ever voiced by Williamson or by Belaunzaran. As Castro phrases it, "They're not going to tell me that." (2:350.)

Does a preponderance of the evidence show unlawful motivation? Even if it does, would 2 weeks of alternating assignments, on routes for which Castro is cross trained, constitute an unlawfully discriminatory action when there is no loss of pay, no reduced (or even overtime) hours, and discernable adverse impact other than a somewhat greater potential that Castro could make a mistake? As to the first question, I find that the evidence fails to rise above the suspicious circumstances of (1) timing (shortly after Castro testified adversely to PDI), (2) the unusual nature of alternating assignments on five routes, and (3) the lack of a business need or purpose to do so (no evidence

that any drivers missed any work, and not shown to be for additional training purposes). The missing link is something that points to an unlawful motive—such as an adverse impact—rather than circumstances that are merely consistent with an illegal purpose. That takes us to the second question, and as to this I find the answer to be no—particularly where, as here, the allegation is that “onerous” working conditions were imposed. A temporary assignment of driving alternate routes, for which the driver is cross trained, has not been shown here to have been “onerous.” On these considerations, I find this portion of the allegation to have no merit.

d. Increasing Castro's work load

One of Castro's duties as a day driver was to unload night delivery trucks and to check in merchandise, as directed by the supervisor. (1:121, 208, Castro.) Before he testified against PDI in August 1996, Castro asserts, he would be asked to unload trucks only once or twice a week, at most. On (Friday) September 13, after his testimony, this changed, with his assignments to unloading trucks occurring every day. And although three to four others also would be assigned to help unload initially, before long Castro would see them up front checking merchandise. When Castro asked Williamson about this, around 10 a.m. that September 13, Williamson replied, “I am the boss. You have to do as I say.” Castro then complained daily to Belaunzaran when Belaunzaran frequently would be nearby watching him and smoking a cigarette. Belaunzaran would respond, “Don't worry. I'm going to find out [about] all of this.” Belaunzaran would then send Jesus Fernandez to assist Castro, but shortly afterwards Williamson would call Fernandez away. This continued until Castro was terminated. Castro thinks this was done to pressure him into quitting PDI. (1:208–213; 2:283, 306–314, 353.) No one ever told Castro of a reason for the September 13, 1996 change which resulted in his having to unload trucks every day. (2:331.)

As Castro testified that the extra help of three persons or so made the work easier (2:315), it appears that the work of unloading the five (1:209; 2:315–316) night trucks was not simply operating a forklift truck, but that it involved, at least to some extent, hard, physical labor—not the far easier work of checking in merchandise that, apparently, his senior driver status had earned for him previously.

According to Williamson, he always made sure there were three drivers unloading the night trucks, occasionally he helped out himself, and he never assigned Castro to unload by himself. (3:645–646.) Belaunzaran testified that he investigated Castro's complaints respecting unloading and found them to be baseless. What happened on these occasions, according to Belaunzaran, is that the driver, who had been helping, had to move the empty truck and move a loaded truck into position. This temporarily put the driver into a different part of the unloading process, the switching of trucks. At other times, when Castro would complain, Belaunzaran would send Jesus Fernandez to assist. (4:766–769.)

Belaunzaran's version makes little sense because he focuses on one person, a driver, rather than the other persons of the three to four man team assigned to unload. And if Castro needed no help, why did Belaunzaran send Jesus Fernandez?

Finally, why did Castro, one of two or three senior drivers out of 9 or 10 drivers, get switched on September 13 to unloading trucks daily anyhow? These questions are not answered. I do not credit Belaunzaran, and I do not believe Williamson who, as in general, testified very unpersuasively. On this portion of the allegation Castro has a strong edge. Crediting Castro, I find merit to the increased work load portion of complaint paragraph 9.

e. Placing Castro's work under close scrutiny

Following the July 1994 election, Castro testified (2:251), PDI instituted a procedure whereby the drivers would fill out a form denominated “Daily Driver Report” (GCX 9). [According to Belaunzaran, 4:782, the form predates the election.] The form commonly is known as an “itinerary.” (1:100, Williamson; 2:251, Castro; 4:781–782, Belaunzaran.) The drivers use the form to record data such as departure time from the warehouse, delivery times to the customers, time of return, number of containers (“totes”) delivered, mileage, and customer name or identification number. (1:77–78, Williamson; 1:123, Castro; GCX 9.) The drivers were told that the purpose of the itineraries was to enable PDI to control the arrival times. (2:332–333.)

Before he testified against PDI in August 1996, Castro asserts (2:252), Williamson never questioned him about his itineraries, or driver's reports. But after he testified, Castro continues (2:252), Williamson would question him about his itineraries every second day—“One day, yes, one day, no. He will let me rest one day.” Castro never observed Williamson ask other drivers about their itineraries (2:252) even though (3:432) Castro would watch Williamson. Although Castro does not personally know that Williamson never looked at the itineraries of the other drivers or asked them questions, the other drivers told him that Williamson had not asked them any questions. (2:432–435.)

Other than one occasion when Williamson contended that customer 8530 had complained about a pipe not delivered, Williamson never said that any other customer complaints about Castro had been received. (2:252–253.) Castro's personnel file contains no reports of customer dissatisfaction with Castro's service. (1:65–66, Belaunzaran.)

Williamson testified that he would file the itineraries, and that the only time he ever looked at one was if there was a customer complaint. He denies inspecting Castro's itineraries more than he does so respecting the itineraries of other drivers. (4:674.) Similarly, Belaunzaran asserts that he, too, never looks at an itinerary in the absence of a customer complaint, and he never directed anyone to look at Castro's itineraries in 1996. (4:782.) Belaunzaran also denies closely scrutinizing Castro's work. (4:851.) Williamson admits that, in all of the years of Castro's service, Williamson never received notice from a customer complaining that Castro had made a late delivery. (1:96; 4:756.)

As with the last topic, Castro easily carries the day on this portion of the allegation. Williamson and Belaunzaran were not credible on this topic, except as they corroborate Castro's version.

f. Summary

In overall summary, I find that, as alleged by complaint paragraph 9, PDI, from about early September 1996 to November 6, 1996, violated Section 8(a)(3) and (4) of the Act by imposing onerous working conditions on Jose Castro by increasing his work load and placing his work under close scrutiny. I shall dismiss paragraph 9 as to the alleged grounds of verbal harassment and changed work assignments. As Castro's testimony supported the Union, the discrimination against him because of his testimony also violates Section 8(a)(3).

4. Jose Castro discharged November 6, 1996

a. Introduction

Complaint paragraph 10 alleges that about November 6, 1996 PDI discharged Jose Castro. PDI admits the fact, but denies the further allegations that it did so because of Castro's union activities or because he testified under the Act.

The events triggering Castro's discharge occurred the day before, on November 5, 1996. Before covering those events, and the discharge interview the next day, I return to the implied threat incident alleged, in complaint paragraph 6(c), to have occurred on October 24, 1996. Recall that I dismissed the allegation because of all the confusion about the date of the incident, or incidents. At the same time I specified that the matter could be used for argument in support of a party's position on other allegations. As I remain persuaded that the evidence surrounding that incident, or incidents, still appears confused, I do not rely on it, and I shall address it no further.

b. Events of November 5, 1996

(1) Facts

The event here concerns as asserted delay in Castro's leaving on his route Tuesday, November 5, 1996, and his conversation with Fleet Supervisor Williamson concerning the cause for his asserted delay. It was an asserted insubordination (a claimed refusal to explain to Williamson) that resulted in Castro's discharge the following day.

The morning of November 5, Castro testified, he again found himself unloading trucks by himself. Belaunzaran came to the dock to take a smoke. As Belaunzaran observed Castro unloading, Castro asked him to send him some help. Belaunzaran said he would as soon as he finished his cigarette. No help was sent, and Castro states that he did not complete the unloading until 11:30 a.m. (2:253-255.)

That completion time of 11:30 a.m. put Castro a bit behind schedule, for as Belaunzaran testified (1:63-64), the loading process begins at 11 a.m. Castro hustled over and began loading his truck, completing that task by, according to his testimony, about 12:18.¹² (2:255.) The expected departure time is a bit loose, as stated in the record, with Castro placing the time at 12:30 (1:121; 3:448), and Belaunzaran (1:60; 4:787) and Williamson (1:84-85, 89-90, 99) putting the normal time as between noon and 12:05. Documents in evidence (GCX 9) show that there are delayed starting times, but the accuracy is

disputed. I need not resolve that dispute to determine the critical events here.

In any event, Belaunzaran testified (1:61-62), Castro should have left at 12:05 because that is when his truck was ready to go. This ties to Williamson's testimony that he cleared Castro to leave at 12:05. (1:84-85; 4:683, 697.) This was after Castro initially reported that he was missing one ticket. While Williamson was reprinting a new one,¹³ Castro reported that he had found the original. Williamson then cleared him to leave. The time was between 12:04 and 12:06, or about 12:05. (4:683, 697.)

Castro testified that it was about 12:18 when he reported to Williamson that a ticket was missing, giving Williamson the number. When Williamson said he would reprint it, Castro said he was going to the men's room. Williamson said "Fine." In the men's room Castro met Belaunzaran at the lavatory. Pointing to the time of 12:18 on his watch, Castro told Belaunzaran to look at the time, that he had just finished loading, that a ticket was missing, that Williamson was reprinting it,¹⁴ and that he had not left because of the missing ticket. Belaunzaran "stared" at the watch. When Castro left the men's room the time was about 12:22. Castro picked up the ticket from Williamson, but had to return to the office for his itinerary that he had forgotten. He then picked up his lunch from his car in the parking lot, and was about to enter his truck, at 12:27 to 12:30, when he heard Williamson paging him. (2:255-257; 3:448-453.)

According to Williamson, after clearing Castro at 12:05 Williamson turned his attention to dispatching the other drivers. About 12:15 Williamson observed that Castro's truck was still parked at the loading dock. Not seeing Castro anywhere, Williamson paged Castro. Some 10 minutes after the page, Williamson observed Castro walking from his car in the parking lot toward the truck area. Gaining [method not identified] Castro's attention, Williamson called him inside the warehouse where, using the services of "Little Robert" (Roberto Diaz)¹⁵ as an interpreter, Williamson asked Castro why he had not left yet. As interpreted (and with pronouns converted here), Castro's answer was: "I don't have to tell you. I'll tell Leo." With that Castro walked off toward Belaunzaran's office. Returning a few minutes later, Castro left on his route. Williamson then prepared two memos (RXs 7, 8) describing the incident (one, RX 8, in more detail), and submitted them to Belaunzaran, who said he would investigate the matter. (1:84-88; 4:684-697.) The two-paragraph memo, the one with more detail (RX 8), is

¹³ The record is confused as to who reprinted the ticket. Williamson says he did. (4:683). Belaunzaran appears to claim that he did. (4:864). Castro thinks the ticket could have been the original rather than a reprint. (3:449, 453).

¹⁴ At one point at trial Castro appears to state that it was Belaunzaran, not Williamson, who was reprinting the ticket. (3:448). I think Castro misunderstood the question, and that his answer means that it was Belaunzaran, not Williamson, whom he met in the men's room. I so find.

¹⁵ Roberto Diaz is the UPS export clerk. (5:940, Belaunzaran). Drivers call him Robertito, an affectionate nickname, and he works at a desk at the front of the area near Williamson's office. (2:243-244, 257-258; 3:450; RX 1).

¹² All times shown in this section are afternoon hours, except morning times are stated as a.m.

generally consistent with the testimonial account, although in this November 5 memo Williamson describes two pages, the first being about 12:15 and the second at 12:25, the latter being when he saw Castro near his truck.

Castro's account of his interpreted conversation with Williamson is very different. Recall that Castro estimated the time as 12:27 to 12:30 when, as he was about to enter his truck, he heard Williamson's page [the second page per Williamson's memo]. When Castro entered the warehouse office, he found Williamson sitting on the desk of Roberto Diaz. With Diaz interpreting, Williamson asked what Castro had been doing from 12:05 to 12:25. In some strange effort to give a "complete" answer, Castro replied that he had unloaded trucks from 9 a.m. and had been loading his truck from 11:30 a.m. (2:258.) Not surprisingly, Williamson asked his question a second time. "Q. And what was your response? A. The same one." (2:258, Castro.)

On repeating his second answer, Castro asked Diaz if he had interpreted his first answer. Diaz said yes, "but what do you want me to do, this man is like this. I already told him what you told me." (2:258.)

Then Williamson asked his question a third time. This time Castro asked Diaz to tell Williamson that, if Williamson wanted to, he and Castro could confer with Belaunzaran about this when Castro returned from his route. After this was (apparently) interpreted, Williamson remained silent for several seconds. Castro then told Diaz to ask Williamson for permission to go to Belaunzaran's office because the time already is late. After again remaining silent for several seconds, Williamson said, "Tell him to go." (2:259; 3:451.) Castro then went to see Belaunzaran, placing his arrival time there (as does Belaunzaran, 4:854, 855) at about 12:35. (2:259; 3:452; RX 1.)

In Belaunzaran's office, Castro testified (2:259-260), he reported his version of what had happened. He also reminded Belaunzaran of their chance meeting in the men's room at 12:18. Castro then asked, "Why is this man [Williamson] asking me what did I do from 12:05 to 12:25? Then all of you say that I arrive late." [It is not clear if, by his last statement, Castro meant that in the past he had been accused of arriving late, or whether, possibly by the phrasing of the interpretation, he meant that now, because of this delay, he would be accused of arriving late this date at the customers.] Belaunzaran answered, "Don't worry. Leave. I'm going to fix that." Castro then left on his route, arriving at his first stop, the warehouse in Broward County, about 1:10 to 1:12. When traffic is heavy, the trip takes an hour to an hour and 15 minutes. This day the traffic was not heavy, so it required only 40 to 45 minutes. (2:259-260.) [Williamson confirms that a trip with normal traffic takes about 45 minutes. (1:91.)] If Castro left at 12:40 (any earlier time seems unlikely given that both he and Belaunzaran agree he did not reach Belaunzaran's office until 12:35), that would place his arrival time at the Broward warehouse at about 1:20 to 1:25. Neither party offered this itinerary into evidence.

When Castro came into his office, Belaunzaran testified (4:854), he was making [unspecified] "allegations" against Williamson and saying that he was going to sue Williamson for "discrimination." Castro was "raving and raising his voice." Belaunzaran told him he would investigate whatever had hap-

pened and get back to him. When Castro began saying something about having gone to his truck, and that Williamson had followed him to find out about the delay, Belaunzaran told Castro, "Just go on your run. I will investigate the problem and get back with you." Castro then left. He was late in leaving on his route. (4:854.) When asked if Castro's description of the men's room watch incident was true, Belaunzaran testified, "I don't recall. I used to meet Mr. Castro everywhere I turned." (4:860.)

Belaunzaran then began his investigation. First he spoke with Williamson who reported events (consistent with his account above) ending with Castro's saying he did not want to talk with Williamson, but wanted to talk with Belaunzaran, whereupon he went to Belaunzaran's office. Belaunzaran then spoke with Roberto Diaz who said Castro had gotten very "irate" at Williamson's question about what he had been doing, that Castro said "I want to see Leo" and simply [left and] walked to Belaunzaran's office. Belaunzaran obtained copies of the tickets, ascertaining that they showed print/reprint times of 12:05 [the original?] and 12:08 [the reprint?]. Diaz later submitted to Belaunzaran an undated one-sentence memo (GCX 23) reading: "Rob [Williamson] asked Castro about what was he doing at 12:00 to 12:25 p.m. and Castro said he wanted to talk to Leo." Belaunzaran asserts that he does not know what kind of lawsuit Castro was talking about, and does not know if Castro meant an NLRB charge. (4:855-857; 5:938-946.)

[These time-stamped documents, the most crucial documents in the case, were not produced (and perhaps not subpoenaed), not identified, and not offered by either party. Notwithstanding the crucial importance of the time sequence, down to the minute, of the events from noon to 12:30, it is a total mystery why the parties generated 990 pages of transcript, and introduced several exhibits, yet neither party saw fit to offer these time-stamped documents. It is unfair to the judge, the taxpayers, and to the clients of counsel. Were it not for the time and expense involved, and the fact that this formal proceeding is adversarial in nature (with both sides represented by capable attorneys), I would reopen the trial for the purpose of having these documents produced.]

Around 5:30 to 6 the afternoon of November 5, Belaunzaran spoke with Castro when the latter returned from his route. Belaunzaran asked Castro what had happened [earlier]. Castro said that a ticket was not ready and Williamson was trying to cause him to be late departing on his route. He said he could not make Williamson understand, so he asked to speak with Belaunzaran. Williamson gave permission. Belaunzaran's conclusion was that Castro had "refused to answer Rob." Because Belaunzaran knew that the [original?] ticket was shown to have printed at 12:05, "which comports to the" "12:08, 12:10" time Castro was to leave for his route, "I figured that there was no sense in continuing the questioning because that was it." [Why did Belaunzaran not confront Castro with the time stamped tickets? Belaunzaran was not asked.] The insubordination, Belaunzaran explains, consisted of Castro's refusing to answer Williamson's question, repeated two or three times, concerning where he had been, and, instead of answering that

question, saying, "I want to see Leo. I talk to Leo. I don't talk to you." (4:864-865.)

That afternoon Belaunzaran decided that Castro should be discharged for insubordination to his supervisor, by refusing to answer his repeated question. In making this decision, Belaunzaran considered Castro's previous insubordinations. Although not an independent ground for his discharge decision, Belaunzaran observed that the late departure would have inconvenienced customers. Belaunzaran made the decision without consulting with any other management officials. Belaunzaran previously has discharged other employees for insubordination—Jack Tondreau, a driver, and Shannon Sanders, a puller. (1:56-60; 4:857-861.)

Belaunzaran prepared a termination memo (GCX 8) to Castro dated November 6, 1996. (4:867.) Although it gets ahead of the story, quoting the memo's text is pertinent because it refers to asserted times of critical events (one especially crucial) on November 5. Addressed from Belaunzaran to Castro, regarding "Insubordination," the text of the memo reads, with minor corrections and emphasis added (GCX 8):

Jose on May 5, 1995 you were suspended for 3 days for insubordination towards your supervisor. At this [incident] you were asked to help to unload a truck and you refused. On January 23, 1996 again you were written [up] for insubordination towards your supervisor and you were advised that it was your final warning.

On November 5, 1996 you came into my office at 12:35 p.m. and informed me that you were going to sue your supervisor Robert Williamson for personal discrimination. As you are aware, Parts Depot Co. does not discriminate in regards to sex, marital or veteran status, race, color, religion, national origin, age, or disability.

Jose I investigated your allegation and the outcome is as follows.

- (1) Your truck finished loading at 11:53.¹⁶
- (2) You told Rob you were missing (1) ticket.
- (3) Rob went to reprint this ticket. Meantime you found the original ticket.
- (4) Your truck was ready to go at 12:05 p.m.
- (5) At 12:25 your truck was still at the loading dock. Rob started paging you to find out what was the holdup. You were observed in the parking lot, standing by your car. When you finally came in, Rob asked you where you were. You refused to answer him and came into my office to inform me that you were going to sue him.
- (6) As you know, we have an obligation to our customers to deliver the right part at the right time. As your supervisor, Rob had the authority to ask you why you had not left to do your route. You impacted our customers by being late.

¹⁶ This extremely crucial time of 11:53 a.m. is not mentioned a single time in the 990-page transcript of testimony. (Indeed, it is not even mentioned in the post-trial briefs!) Thus, there is no explanation whether Belaunzaran obtained the time from a document, by report from Williamson or some other witness, or by estimating back from the 12:05 time stamp of the original ticket.

Jose, with your constant lack of respect to supervision and disruption of service to our customers, you leave us no choice but to terminate your employment with Parts Depot Co. effective 11-6-96.

(2) Discussion

Two items are of critical importance in determining what happened on Tuesday, November 5, 1996. First, what was the timing of events. Second, what was said when Castro responded to Williamson's question asking for an account of his time from 12:05 to 12:25.

Respecting the time sequence, it is truly unfortunate that neither party introduced the time-stamped documents in question. Although the documents are under PDI's control, I draw no adverse inference from PDI's failure to introduce them because the General Counsel, who carries the burden of proving unlawful discrimination by a preponderance of the evidence, should have established, if such was so, that the Government had subpoenaed the documents but that, for whatever reason, they were not available or not produced. Moreover, the Government did not level a best evidence objection when references were made to the time shown by the time stamp on the tickets. Because both counsel are capable and experienced, I can only assume that trial strategies dictated the choices they made. It is an adversary proceeding, and those choices of counsel may well control the outcome of the case.

The discharge memo (GCX 8) prepared by Belaunzaran was not received for the independent truth of the contents. Although there is no independent evidence corroborating Belaunzaran's assertion in the memo that Castro's truck was loaded by 11:53 a.m., I accept that as the information (correct or incorrect) which Belaunzaran had before him when he made his decision. *Once this loading time is set, the entire sequence of events fits under the version which best accords with that loading time.* In this situation, it is PDI's version (Castro dispatched at 12:05) which fits because Castro's 12:18 time leaves a gap of at least 13 to 15 minutes.

But if PDI's version best fits, how do we reconcile the 12:18 men's room encounter in which Belaunzaran "stared" at Castro's watch? How could Belaunzaran not recall such an incident, even if he could not recall the time displayed? Belaunzaran's feeble "I don't recall" is not credible. Does that trump the 11:53 a.m. and 12:05 times? Not yet.

Recall that when Castro emerged from the men's room about 12:22, he then obtained the missing ticket, or a reprint, from Williamson himself. Why would Williamson want to know where Castro had been if he had just seen him twice, once at 12:18, when Castro (under his time sequence) reported the ticket missing, and again at 12:22, when he picked up the ticket? Could it be a trap, with backdated times, all for the purpose of getting rid of Castro because he testified against PDI in August 1996, and now ("now" being later the same day) because Castro was threatening to sue (and PDI interpreting that to mean another NLRB charge)? Remember, Castro had no help in unloading that morning. Was it a conspiracy to cause him to be late at every stage—unloading, loading, dispatch, departure, delivery times? [If so, why does PDI contend that the dispatch time was the normal time of 12:05?] After all,

in the first case I found a similar fraud involving a conspiracy to move the actual time of Vivian Fortin's June 23, 1994¹⁷ visit to Ronald Casco in the Core Department from 7:10 a.m. to the false time of 7:30 a.m. in order to provide a basis for issuing her a final warning. (JD at 85:33–36.) It was, I found, “a fraudulent manipulation of the time of the event so that, by such fraud, PDI could issue Fortin a final warning.” (JD at 86:26–28.) Did the same thing happen here 2 years 4 and a half months later?

Possibly. But I am not satisfied that it did. If there was any manipulation respecting this incident, I find that it was by Castro. The key to resolving this puzzle lies in Castro's own version of his conversation with Williamson at the desk of Roberto Diaz about 12:27 to 12:30 when Williamson asked Castro, three times no less, what had he been doing from 12:05 to 12:25. [We know that Castro understood Williamson's reference to those times because Castro admits that he repeated them when he spoke with Belaunzaran at 12:35. (2:260.))]

Now even if Castro suspected a trap of some kind, what would any sensible person have done? Possibly he would have done just as Williamson reports (refusing to talk to Williamson), and have walked into Belaunzaran's office protesting that it all was a trap. Even if Castro's protest in Belaunzaran's office can be considered such, Castro's version of the first part, his conversation with Williamson, does not fit Williamson's description. Instead, Castro describes what can only be considered as silly and disrespectful (and, yes, insubordinate) answers to a simple question—a question repeated three times. A sensible employee would have answered directly and with the truth, detailing his whereabouts. Unless he had something to hide. Apparently having something to hide, I find, Castro dissembled. And the key to determining this lies in what Castro specifically did *not* point out to Williamson. Thus, Castro did not respond to Williamson something as follows:

Hey, Rob, how could you forget that I had no help this morning, and that it was just barely 14 to 15 minutes ago, about 12:15, that I finished loading my truck. Surely you recall that I came in, got my paperwork, discovered that a ticket was missing, and that at 12:18 I told you that ticket was missing and you told me you would reprint it? Why, all you have to do confirm this is to check the time stamp on the reprinted ticket and it should show something like 12:18 to 12:21. In any event, I said I would go to the men's room and you said “Fine.” Just 4 minutes after that, and a bit over 5 minutes ago, at 12:22, I came out of the men's room—where, by the way, I spoke with Leo and showed him the time of 12:18 on my watch. You can verify that with Leo. Don't you remember that I picked up the ticket from you, at 12:22, as I headed for my truck. How could you forget these things, especially since you, at about 38, are not some old judge with early Alzheimer's? But one thing you might not have seen is that I had to come back to the office and get my itinerary. Then, as usual, I went to my car and got my lunch. When you paged me at 12:25 p.m. I was just about to open my truck door to get in and start on my route. Rob, I think that pretty well covers

the time from 12:05 to 12:25 that you are asking about, but I still don't understand why you're asking me about it because you were involved in several of these times. Would you mind telling me why you are asking me about that time period?

Castro said none of this. The reason he did not, I find, is that he apparently had something to hide. He generalized and dissembled because his time frame needed to start with the completion of the loading of his truck at about 12:15 or so. [It could have been earlier. PDI's asserted time lapse from completed loading to first dispatch was 12 minutes, from 11:53 a.m. to 12:05.] That gave him 3 minutes to come to the warehouse office, check his paperwork, and, at 12:18, notify Williamson that a ticket was missing. He saw Belaunzaran in the men's room, and was dispatched, by his version, about 12:22—some 14 minutes after the amended dispatch of 12:08 asserted by PDI.

Because I find that Belaunzaran reasonably relied on the reports made to him, and the time-stamped documents, this, by extension, is what happened. At 11:53 a.m. Castro completed his unloading. At 12:05 Castro was dispatched the first time, and at 12:08 the second time. Instead of leaving then, Castro delayed for whatever personal reason he had. Some 17 minutes later, about 12:25, as he was about to get into his truck, Castro heard the page and returned to speak with Williamson. Rather than account for this 17 minutes to Williamson, Castro dissembled. Williamson acted reasonably in reporting the matter to Belaunzaran, and Belaunzaran reasonably concluded that Castro—even under his own version—had been insubordinate to Fleet Supervisor Williamson.

This does not resolve Castro's specific report of having seen Belaunzaran in the men's room with Belaunzaran staring at the 12:18 time on Castro's watch. Castro's detailed description was credible. [Granted, Castro could have seen Belaunzaran in the men's room about noon, and later devised the embellishment that the time was 12:18, that he showed the time to Belaunzaran, and that Belaunzaran “stared” at his watch.] Belaunzaran does not deny Castro's account, instead offering a feeble, and noncredible, “I don't recall.” Recognizing that the watch incident conflicts with the time sequence presented by PDI, and that Castro's description was specific, I nevertheless am unable to find that it occurred. But I do not find that it did not occur. Contrary to the physics of Justice Holmes, it remains suspended in space, like a “brooding omnipresence in the sky.”

That Belaunzaran included a line in the termination memo (GCX 8) about Castro's having “impacted our customers by being late,” when there is no record evidence of such beyond the first stop, clearly is based on an assumption that a late start time means late deliveries. However, the credited evidence shows that Warehouse Manager Belaunzaran reasonably reached, on the basis of the evidence before him, the single ground of the decision—that on November 5, 1996 Castro had been insubordinate to Fleet Supervisor Williamson. Turn now to the termination itself.

c. Jose Castro fired November 6, 1996

At the end of the day on Wednesday, November 6, 1996, Belaunzaran (in the presence of Assistant Warehouse Manager

¹⁷ My decision there incorrectly states the year as 1997. (JD at 83:17.)

Angel Gonzalez and Fleet Supervisor Williamson) read the Spanish version (GCX 16) of the discharge memo to Castro. [Sadly reflective of some problem Castro has, at inopportune times, of not obeying his superiors, when Belaunzaran, before announcing that Castro was being discharged, told Castro to read the paper, Castro, as he admits, “did not take the paper,” and Belaunzaran “started to read the termination in Spanish.” (2:270.)] Neither Williamson nor Gonzalez spoke during the meeting. (2:269; 4:698, 862.)

Following Belaunzaran’s reading of the discharge memo, Castro asked if he could speak in his own defense. Belaunzaran told him no, that he had been discharged, and he no longer had any rights. (2:268–272; 3:454–457, Castro.) Belaunzaran’s version of that is differently phrased, but the effect is the same. Thus, Belaunzaran concedes that he denied the request with the words, “No, I already made up my mind, thank you very much.” (4:863.) Belaunzaran testified that he had given Castro opportunities before [here apparently including other incidents], and on every document from 1994 through 1996 he had always signed under protest, so Belaunzaran felt it was unnecessary for Castro to explain anything else. “I had made my decision that he was going to be terminated at that point and I stuck with it. At that moment he shook my hand and walked out.” (4:863.)

The General Counsel argues (br. at 64) that PDI has tolerated insubordinate conduct in the past, citing Ricardo Maradiaga’s racist remarks to Belaunzaran about Fleet Supervisor Williamson, and Maradiaga’s statements about breaking Williamson’s head. Recall that Belaunzaran said that he first treated this as “blowing off steam,” although he “reprimanded” Maradiaga. (5:971.) Treating the Maradiaga’s last statement of possible violence more seriously, Belaunzaran documented (RX 10) the oral reprimand. (5:962–963.)

First, the two situations are not comparable. However light the punishment, Belaunzaran treated Maradiaga’s comments as “blowing off steam.” Belaunzaran has an open door policy. Listening to an employee “blow off steam” would be a part of that policy, up to some limit dictated by concerns of safety when potential violence is an indicated possibility. Notwithstanding his oral reprimands of Maradiaga, Belaunzaran apparently tolerates a lot under his policy, a tolerance which seems to be greater than that expressed in PDI’s policy statement (GCX 3 at internal 40) about racist remarks. Second, Maradiaga was not directly defying Williamson face to face—as Castro did.

The Government never overcame the two strikes Castro had against him to start with (the May 1995 suspension and the February 1996 final warning). PDI followed a progressive discipline route respecting Castro (even though the steps are entirely discretionary under PDI’s policy, GCX 3 at internal 38), with Belaunzaran even declining to take advantage of other opportunities to impose other discipline on Castro or to fire him earlier than he did.

The General Counsel protests (br. at 64) that PDI never introduced documentation to substantiate Belaunzaran’s assertion (4:861) that he had fired two others (Shannon Sanders and Jack Tondreau) for insubordination. But nothing prevented the Government from subpoenaing the files of those two former

employees and showing that Belaunzaran, at the very least, had been mistaken.

Finally, there is no disparity evidence. Thus, there is no evidence that Williamson ever disregarded a gap of 15 or so minutes between dispatch time and departure time and failed to call in the driver (especially one not publicly associated with supporting the Union or testifying against PDI) to explain his whereabouts, yet when Castro had such a gap, Williamson immediately jumped on him for an explanation. A lack of disparity evidence can be fatal to the Government’s case. See, for example, *Industrial Construction Services*, 323 NLRB 1037 (1997).

My bottom line finding is that, in the 990-page transcript of testimony and several exhibits, the evidence fails to establish, by a preponderance of the evidence, that PDI was unlawfully motivated in discharging Jose Castro on November 6, 1996. Accordingly, I shall dismiss complaint paragraphs 11 (discharged because of his union activities) and 12 (discharged because of his August 1996 testimony against PDI).

CONCLUSIONS OF LAW

Respondent Parts Depot, Inc. is shown to have violated Section 8(a)(1), (3), and (4) of the Act in the particulars and for the reasons stated above, and its violation have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act. In certain particulars discussed, including the November 6, 1996 discharge of Jose Castro, PDI did not violate Section 8(a)(1), (3), or (4) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On brief the Union argues that I should issue a bargaining order in this case, citing cases in which second bargaining orders have issued even after a first one already had issued. The Union assume that all allegations have been found to have merit. I have not so found. Similarly, the General Counsel argues for such and includes, with its brief, a proposed order containing provisions requiring PDI, on request, to recognize and bargain with the Union. In its June 4, 1998 Reply Brief, PDI argues that the cases cited by the Union and the General Counsel are inapposite because the unfair labor practices found there are far more extreme than any here.

Early in this decision I quoted from the Board’s August 8, 1997 Order (GCX 1n) in which the Board directs me, if a violation is found here, to address the issue of whether a bargaining order is appropriate in light of this case and the first one (both cases), assuming that such an order is not appropriate in the first case standing alone. Again in its Reply Brief, PDI, citing *Visone Construction*, 323 NLRB 471 fn. 3 (1997), argues that a bargaining order is not appropriate because it was not requested in the complaint. There is no merit to this argument. First, *Visone* is not a *Gissel* case. Second, in *Visone* the General Counsel excepted to the ALJ’s improperly issuing a bargaining order. Here the General Counsel requests a bargaining order,

and did so at the close of the trial (5:987). [Because PDI was well aware that I would have to address the issue of a bargaining order, PDI could have included some of its argument against such in its original brief rather than improperly reserving everything for a reply brief.] Third, the matter is res judicata by the Board's order of August 8, 1997 (GCX 1n). Fourth, in any event, bargaining orders are remedial, and the Board, not the General Counsel, controls the remedy.

In *Parts Depot I* I issued a recommended bargaining order based on seven preelection violations of Section 8(a)(1) plus both preelection and post election violations of Section 8(a)(3) of the Act, including the permanent layoff [read discharge] of Vivian Fortin who (JD at 109:39-40) "had become the most prominent symbol of the Union's organizing campaign" And the unlawful postelection wage increases "plus the elimination of Fortin serve as a powerful combination punch effectively knocking out any future organizing." (JD at 110:16-17.) In the following two paragraphs I wrote (JD at 110:19-34):

The discrimination against Vivian Fortin, the symbol of the Union's organizing campaign, reinforces the chilling effect of the wage increases and other violations. Fortin's layoff especially tends to freeze any urge of other employees to support the Union. Fortin's layoff and her case against PDI were a topic of discussion in the local auto parts industry and, as I have inferred, likewise discussed by bargaining unit employees.

Finally, although Peter Bassett is no longer with PDI, Chairman Rollance E. "Rollie" Olson, a major owner of PDI, and Vice President Mark Noble (as of the trial) still are. Absolutely nothing suggests that these corporate officials are likely to change their animus against the Union. That being so, merely ordering another election (plus issuing a cease and desist order and requiring that a notice be posted) would be a futile remedy, for the animus at Vivian Fortin [name per correction of November 21, 1997] flows from the top down. It is not possible to erase the effects of the violations here. On balance, the employee sentiment expressed in the authorization cards would be best protected by a bargaining order.

Did getting rid of Vivian Fortin on October 27, 1994 cool the fires of PDI's animus so that now a fair election would be possible? Hardly. Nearly 2 years after it got rid of Fortin, PDI was at it again, this time obstructing the Board's processes ("interfered with the vindication of employee rights under the Act") "by telling employees not to honor Board subpoenas" for the first trial. Then, once again with Peter Bassett leading the charge, PDI brutally "declared war" against the Union's most prominent supporter remaining—Jose Castro. Thereafter, as I have found, PDI unlawfully increased Castro's work load and placed his work under close scrutiny. It appears that, in the fall of 1996, PDI was trying to persuade Castro to quit or to provoke him into making a mistake so that it could fire him.

Eventually, on November 5, 1996, Castro did make a mistake. Unfortunately for Castro, the type of mistake he made on November 5 was unrelated to any unlawful conduct by PDI, but merely consisted of his refusal to answer a simple question (asked three times) by his supervisor. In effect, Jose Castro fired himself, thereby relieving PDI of the legal risk associated with its doing so.

Nevertheless, the violations found here are a continuing response by PDI to the attempt by employees to secure representation by the Union, and to seek, through resort to the process of the Board, vindication of their rights under the Act. What I wrote June 30, 1997 remains true today (332 NLRB No. 64, slip op. at 52 (2000)):

It is not possible to erase the effects of the violations here. On balance, the employee sentiment expressed in the authorization cards would be best protected by a bargaining order.

Accordingly, I shall include in the order provisions requiring PDI, on request, to recognize and bargain with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The Respondent, Parts Depot, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with the vindication of employee rights under the Act by telling employees not to honor Board subpoenas.

(b) Impliedly threatening employees with discharge because they testify against Parts Depot in a Board proceeding.

(c) Discouraging membership in Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE) (the Union), or any other labor organization, by imposing onerous working conditions of employees because they engage in Union or other protected concerted activities, or because they testify in a Board proceeding.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All warehouse employees, customer service employees, truck dispatcher, and drivers employed by the Employer at its Miami and Ft. Lauderdale, Florida warehouses, excluding office clericals, technical employees, professional employees, supervisors, and guards as defined by the Act.

(b) Within 14 days after service by the Region, post at its facilities in Miami, Florida and Ft. Lauderdale, Florida, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice,

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, 29 CFR 102.46, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, 29 CFR 102.48, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a

copy of the notice to all current employees and former employees employed by the Respondent at any time since late August 1996 (the date of the first unfair labor practice in this proceeding).

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official of a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(d) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges, such as by complaint paragraphs 11 and 12, violations of the Act not specifically found.